ANNOTATED DRAFT INSTREAM FLOW RULES

This document contains annotations to the draft Instream Flow Rules dated June 1, 2001. The annotations consist of comment boxes that record comments received on the draft between June 1, 2001 and July 17, 2001. Where appropriate, a summary DES response to comments has been placed in the comment box.

Proposed additions to rule language are in bold.

Proposed deletions are in strikeout.

The purpose of this annotated version of the rules is to document the comments received on the June 1, 2001 draft for use as a resource by stakeholders in developing comments on the next draft (expected to be released for public comment in September 2001).

The Department of Environmental Services wishes to thank all those who have been engaged in discussions on Instream Flow Rules to date, especially those who commented at the June 29th hearing. We encourage your continued participation in developing the rules.

Sample Comment Box

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1901.01**	David L. Deen – Connecticut River Watershed Council
1-Jul-01	**cwi**				
Comment: **Response:**					

Adopt CHAPTER Env-Ws 1900 to read as follows:

CHAPTER Env-Ws 1900 RULES FOR THE PROTECTION OF INSTREAM FLOW ON DESIGNATED RIVERS

Statutory Authority: RSA 483:9-c,I; RSA 483:11,IV

PART Env-Ws 1901 PURPOSE AND APPLICABILITY

Env-Ws 1901.01 Purpose. The purpose of these rules is to ~~implement~~ **specify** standards, criteria, and procedures by which a protected instream flow shall be established and enforced for each designated river or segment to maintain water for instream public uses and to protect the resources for which the river or segment is designated.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1901.01**	Jennifer J. Patterson – Conservation Law Foundation
13-Aug-01	**cwi**				

Comment: In the first line, replace "implement" with "set" or "establish."

Response: Changed Env-Ws 1901.01

Env-Ws 1901.02 Applicability. These rules shall apply to:

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1901.02**	Sharon Francis – Connecticut River Joint Commissions, Inc.
27-Jul-01	**cwi**				

Comment: We particularly welcome the inclusion of upstream tributary users under the current proposal

Response: Noted.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1901.02**	Judith Spang – Lamprey River Advisory Committee
27-Jul-01	**cwi**				

Comment: In specific terms, the LRAC applauds the following: 2) The new process deals with the river as a holistic system. Previous criticisms about the lack of involvement of upstream resource users and managers have been addressed.

Response: Noted.

(a) Designated rivers under RSA 483 and their tributary drainage areas;

(b) Affected water users; and

(c) Owners and operators of dams on designated rivers and in their tributary drainage areas.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	1901.02 (b) and (c)	Vernon Lang – US Fish and Wildlife Service
19-Jul-01	**cwi**				

Comment: As discussed more fully below [1902.02], I suggest combining dam owners in (c) with affected water users in (b) and deleting subsection (c).

Response: No Change. We have no information to indicate that dams in themselves are a generally significant factor in changing evapotranspiration, interception, or evaporation. If warranted, these factors could be included in either the protected instream flow study or the dam management plan for a particular river.

PART Env-Ws 1902 DEFINITIONS

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**Part 1902**	Matthew A. Chauncey – NH Resident
16-Jul-01	**cwi**				

Comment: Problem: No statement of definition is provided to Riparian Rights.

Response: No Change - further discussion encouraged. Riparian rights are defined by common law and therefore may change over time. Therefore it is not appropriate for these rules to define riparian rights. We recognize the importance of riparian rights issues.

Env-Ws 1902. 01 "7Q10" means the lowest average flow rate for a period of 7 consecutive days with an expected recurrence interval of once in every 10 years, determined at a fixed location on a river or stream, and expressed in terms of volume per time period.

Env-Ws 1902.02 "Affected water user" means a ~~registered~~ water user **required to be registered** under Env-Wr 700 having a withdrawal or ~~discharge~~ **return** location within 500 feet of a designated river or within 500 feet of a stream in its tributary drainage area.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	1902.02	Vernon Lang – US Fish and Wildlife Service
19-Jul-01	**cwi**				

Comment: The definition of affected water user should be expanded to include any water user that uses 20,000 gallons per day or more on any day whether registered or not. This definition should capture dams, impoundments and other impounded surface waters (lakes and ponds) because they are water users much like public water suppliers, irrigators and cooling water users. Impoundments use water from stream and river systems to support evaporation from the waterbody and enhanced evapotranspiration around the perimeter of the waterbody. Impoundments also intercept inflow from source streams and groundwater which can be retained in storage. This change needs to be made to make the rule more equitable and to recognize the role that impoundments can play in depleting streamflow.

Response: Changed Env 1902.02 to include water users required to be registered under Env-Wr 700. Waterbodies are not water users required to be registered under Env-Wr 700. Evaporative losses are not within the scope of the rules.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1902.02**	Ralph B. Pears – Monadnock Mountain Spring Water
13-Aug-01	**cwi**				

Comment: Monadnock objects to the application of the rules at 1902.02 to the use of groundwater within 500 feet of a designated river. There is no supporting scientific data to justify the application of restrictions to groundwater within this zone. DES has an obligation to prove that there is hydrologic connectivity before it proceeds with broad restrictions upon groundwater withdrawals.

Monadnock offered comments and objections to these draft provisions via its attorney, Andrew Serell, in January 2000, raising objections to the application of the rules to groundwater withdrawals within 250 feet of designated rivers. Subsequently, DES amended the draft rules to increase this 250-foot zone to 500 feet. This change was made without providing any scientific data or pertinent NH case studies that would justify the increase in the zone of application.

Monadnock subsequently raised these same objections in testimony to the DES in January of this year. To date, DES has still failed to produce one iota of scientific data to justify application of the rules to groundwater withdrawals from wells located within 500 feet of designated rivers. Monadnock believes that the proposed rules should not be applied to groundwater withdrawals until the Department can demonstrate via generally acceptable scientific data and pertinent case studies that direct hydrologic connections exist between the State's designated rivers and groundwater sources adjacent to those rivers.

Paul Currier, Administrator of the DES Watershed Management Bureau, has publicly acknowledged that the change in the zone of application was "presumptive," and not based on scientific data or indigenous studies.

Response: No Change - further discussion encouraged. It is correct that there is no concise scientific justification for applying the General Standard only to wells within 500 feet of surface water bodies. It would probably be more correct to apply the General Standard thresholds to all registered water users in the upstream watershed. The rules exclude water withdrawals greater than 500 feet from a waterbody largely to be consistent with the previous draft. Water removed from a basin, either by direct withdrawal from surface water or by withdrawal from aquifers is all part of the hydrologic system that supports flow in rivers. Even water removed by wells withdrawing from aquifers located beneath aquicludes must ultimately be replenished from precipitation.

The General Standard is not used to impose restrictions on water use - only to trigger the water management planning process. The Water Management Plan would provide for evaluation and appropriate operating procedures for affected water users that are not closely connected to the surface water system.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	1902.02	Jasen Stock – NH Timberland Owners Assoc.
19-Jul-01	**cwi**				

Comment: Similar to the Department's expansion of WMPA the scope and inclusion of "Affected Water Users" is also increasing. For the same reasons mentioned above the NHTOA is requesting the Department only consider those registered water users on the rivers and sections of rivers currently designated under RSA 483 as affected water users.

Response: No Change. RSA 483:9 specifically allows for inclusion of water users and impoundments upstream of designated reaches. Numerous commenters to the November draft of the rules noted that upstream water use should be included.

Env-Ws 1902.03 "Aggregate water use" means the total water use by all affected water users at **and upstream from** any ~~point~~ **location** on a designated river, being the difference between the sum of registered water withdrawals and the sum of measured registered water returns.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	1902.03	Jeffrey D. Mathis, P.E. – BAE Systems
10-Jul-01	**cwi**				

Comment: [W]e are concerned with the definition of "aggregate water use" and how it applies to the flow protection limits in the General Standard. Does the "aggregate water use" definition apply to all affected users upstream and downstream of the entire watershed, or only within the specific river segment?

Response: Changed 1902.03. Aggregate water use is measured at the beginning of a designated reach and also at each affected water user's location on a designated reach. Aggregate water use is the sum of all upstream withdrawals and returns by affected water users within 500 feet of a surface water body in the tributary drainage area. Water use downstream of an affected water user's location is not part of the aggregate water use for that water user**.**

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	1902.03	Vernon Lang – US Fish and Wildlife Service
19-Jul-01	**cwi**				

Comment: The definition of aggregate water use needs to be changed to capture water used for evaporation and enhanced evapotranspiration at impoundments, and lakes and ponds whose surface area has been expanded due to a dam or other control structure at or near the natural outlet. In addition, aggregate water use should include the volume of water intercepted from surface inflow and ground water and retained as storage in the impoundment as a consequence of water level management.

Response: No Change. We have no information to indicate that dams in themselves are a generally significant factor in changing evapotranspiration, interception, or evaporation. If warranted, these factors could be included in either the protected instream flow study or the dam management plan for a particular river.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	1902.03	Jasen Stock – NH Timberland Owners Assoc.
19-Jul-01	**cwi**				

Comment: This definition fails to consider all water returns from water users, measured and unmeasured. This is an important issue to our membership since many of NHTOA's members (e.g. sawmills) use water during the summer months to water log inventories. In these operations there is not a means to directly measure water returning to ground or surface waters. NHTOA is requesting the Department consider modifying this definition to allow an accounting of these "unmeasured" water returns. In the case of log watering where the water is applied to log piles a simple means of calculating the "unmeasured" water returns would be "water withdrawn – evaporation = water returns".

Response: No Change - further discussion encouraged. Only returns measured or estimated, and reported in accordance with Env-Wr 700 (the state's Water Use Registration and Water Use Reporting Regulations) are counted as returns. Any registered return to the groundwater table or to surface water or groundwater within 500 feet of a waterbody will be applied as a return. We are willing to work with water users to find reliable, efficient ways of measuring return flows.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1902.03**	Joint Comments by AMC, Ashuelot LAC, Audubon Society of NH, Coastal Conservation Association, Coldwater Fisheries Coalition, Connecticut River Joint Commissions, Connecticut River Watershed Council, Exeter River LAC, Merrimack River Watershed Council, Merrimack Valley Paddlers, NH Rivers Council, New Hampton Conservation Commission, Pemigewasset River Council, Piscataquog Watershed Association, Society for the Protection of NH Forests, Souhegan Watershed Association
19-Jul-01	**cwi**				

Comment: This definition does not clearly state the geographic area of concern. The definition should be revised to read: "'Aggregate water use' means the total water use by all affected water users at and upstream from any point on a designated river, being the difference between …."

Response: Changed 1902.03 . Included "...at and upstream from..." in aggregate water use definition.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1902.03**	John Forrestall – City of Concord
14-Aug-01	**cwi**				

Comment: Currently, registered water users report their usage as monthly totals on a quarterly cycle. NHDES has provided a chart of those river segments that do not meet the "general standard for instream flow protection." Those charts are based upon reported demand exceeding certain flow rates. But the reported usage is not reported in a flow rate. Rather it is a totalized volume. The City of Concord, and many other users I suggest, do not withdraw on a full time basis.

Therefore, here is the first comment: rewrite "Env-Ws 1902.03 " Aggregate water use" means the total monthly water use by all affected water users at any point on a designated river, being the difference between the sum of registered monthly water withdrawals and the sum of measured registered monthly water returns." Otherwise, if DES continues with the current definition and begins to collect usage rate data and enforces these rules on a flow rate basis, there will likely be **no river segment that meets the general standard.**

Response: No change - further discussion encouraged. Preliminary assessments were done using the monthly water-use volume data as submitted to the Department. Future assessments would be done using daily water use. Water use that is variable during a month such as that used by public water supplies, irrigation, etc., does create errors in the preliminary assessment that will be corrected as the next stage of assessments are done. We think the General Standard will be an appropriate threshold for daily water use as well as for monthly average water use. A pilot study to compare monthly and daily use is in progress on the Contoocook River.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1902.03**	Ross Povenmire and Allan Palmer – PSNH
20-Jul-01	**cwi**	**23-Jul-01**	**cwi**		

Comment: The definition of "use" is still missing. Much of the IFR hinges on the amounts of water being used, but the term remains undefined. PSNH continues to support the exclusion of water that is simply withdrawn and promptly returned to the river, such as in hydroelectric power generation or for cooling water purposes. Facilities that temporarily borrow water should not be treated the same as users who truly consume the resource.

Response: No Change. Under the definition of aggregate water use, hydroelectric or cooling water would be counted as a withdrawal when and where the water is diverted from a waterbody, and as a return when and where the water is put back into a waterbody. Unless evaporative cooling is used, return flow would be assumed to be equal to withdrawal flow, and measurement of return flow would not be required.

Env-Ws 1902.04 "Commissioner" means the commissioner of the New Hampshire department of environmental services.

Env-Ws 1902.05 "cfsm" means cubic feet per second of flow per square mile of stream drainage area.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	1902.05	Jasen Stock – NH Timberland Owners Assoc.
19-Jul-01	**cwi**				

Comment: "cfsm" – Is a measure of water flow within a stream "drainage area". Drainage area is not defined nor explained as it relates to this measurement. NHTOA suggest the Department seek a more easily measured and less subjective means of measuring water flow not be prone to interpretation.

Response: No Change. Both stream flow and drainage area are measured or estimated at a specific location on a river or stream. Drainage area at any stream location, as used in these rules, would be estimated from USGS 1:24,000 topographic maps, or GIS coverages derived from these maps. NRCS has recently delineated watersheds in NH using national standards. This GIS coverage is available to the public. USGS has developed methods for accurate estimation of drainage area at any river location, using the NRCS delineations.

Env-Ws 1902.06 "Department" means the New Hampshire department of environmental services.

Env-Ws 1902.07 "Designated river" means a~~ny~~ river or river segment that is designated under RSA 483.

Env-Ws 1902.08 "Governing body" means the board of selectmen in a town, the board of mayor and aldermen in a city or the council in a city or town with a council, or the county commissioners ~~when referring to~~ **in** unincorporated towns and unorganized places.

Env-Ws 1902.09 "IFPAC" means the instream flow protection advisory committee established under Env-Ws 1909.

Env-Ws 1902.10 "LMAC" means the lakes management advisory committee established under RSA 483-A:6.

Env-Ws 1902.11 "LRMAC" means a local rivers management advisory committee established ~~pursuant~~ **under** to RSA 483:8-a.

Env-Ws 1902.12 "RMAC" means the rivers management advisory committee established ~~pursuant~~ **under** to RSA 483:8.

Env-Ws 1902.13 "Segment" means a portion of a designated river assigned to one of the classifications identified in RSA 483:7-a.

Env-Ws 1902.14 "WMPA" means the ~~W~~water ~~M~~management ~~P~~plan ~~A~~area, which is the tributary drainage area to a designated river for which a water management plan is required.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	1902.14	Jasen Stock – NH Timberland Owners Assoc.
19-Jul-01	**cwi**				

Comment: Water Management Plan Area (WMPA) - The Department now defines a Water Management Plan Area as "the tributary drainage area to a designated river". Because almost all surface waters in New Hampshire eventually flow into one of rivers designated under RSA 483 this definition almost designates the entire state as a "Water Management Plan Area" (WMPA). The NHTOA proposes the Department only consider rivers and sections of rivers currently designated under RSA 483 as WMPA. While considering those rivers and sections of rivers currently designated under RSA 483 the NHTOA further requests the Department also consider the river's hydrology/ecology equally with its economic importance to New Hampshire's industry and economy.

Response: No Change. RSA 483:9 specifically allows for inclusion of water users and impoundments upstream of designated reaches. Numerous commenters to the November 2000 draft of the rules noted that upstream water use should be included. Economic considerations would be included in the Water Management Plan (see comment responses in Env-Ws 1907).

PART Env-Ws 1903 DE MINIMIS FLOW

Env-Ws 1903.01 De minimis amount available for use. A flow equal to 5 percent of 7Q10 shall be a de minimis amount that is always available for use. **At any location on a designated river,** ~~Instream~~ instream flow shall be considered to be protected if aggregate water use is below the de minimis amount.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1903.01**	David L. Deen – Connecticut River Watershed Council
09-Jul-01	**cwi**				

Comment: CRWC feels this figure should be 2%. At 5 % it would not take too many de minimis withdrawals to pull the flow level below 7Q10. At 7Q10 you are at a low flow level the stream has naturally adjusted to but going below that level puts significant stress on the aquatic life. The language is confusing. The first sentence says 5% is always available for use. The second sentence does not prohibit higher uses it just sets out the protection level but does not stop further withdrawals.

Response: No Change. The de minimis withdrawal value is an aggregate flow that is always to be available for offstream use. It is in essence a guarantee that some water will be available for human uses under all flow conditions. It does not guarantee any one user a certain amount of flow. This amount is the minimum available for shared use. The de minimis amount is quite different from a protected instream flow established under Env-Ws 1906, which may allow use above the de minimis amount.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1903.01**	Maura Carroll – New Hampshire Municipal Association
27-Jul-01	**cwi**				

Comment: [. . .] the new "de minimis" flow standards are not backed up by sufficient scientific data [. . .]

Response: No Change - further discussion encouraged. The de minimis value was selected after review of Vermont's water use regulations. The de minimis flow is not a restriction, but is a guarantee of water available for offstream use regardless of streamflow conditions. The level of the de minimis amount is intended to be low enough that the Department can be confident that this level of water use will not cause significant impacts to instream public uses at any stream flow. The de minimis flow also gives water users a level of certainty that there will always be a specific amount of water available for aggregate use. Current levels of water use on most designated rivers are generally below this de minimis amount for most of the year.

The idea of a de minimis amount is an amount that is so small that most people would agree there will be no perceptible impact on instream public uses when this amount is withdrawn, no matter what the stream flow is. It is a "consensus" value, not a "scientific" value. It is a guaranteed minimum aggregate withdrawal amount.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1903.01**	Robert Beaurivage and Steve Del Deo – NH Water Works Association
10-Jul-01	**cwi**				

Comment: Increase the de minimus Flow Value. Allow affected water users to withdraw up to 10% in aggregate of the available stream flow rather than the proposed 5% of 7Q10. This more reasonable de minimus flow would reduce the amount of regulation required by DES as well as the significant costs for the state to implement the In-stream Flow Rules.

Response: No change - further discussion encouraged. The idea of a de minimis amount is an amount that is so small that most people would agree there will be no perceptible impact on instream public uses when this amount is withdrawn, no matter what the stream flow is. It is a guaranteed minimum aggregate withdrawal amount. We have re-evaluated IFIM fish habitat availability curves assembled for the November 2000 draft rules. We find that "10% in aggregate of streamflow" does not meet the de minimis requirement of "no perceptible impact" on fish habitat availability for the IFIM studies evaluated, and therefore is not a de minimis amount.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1903.01**	Michael S. Giaimo - Business and Industry Association
19-Jul-01	**cwi**				

Comment: § 1 COMMON LAW REASONABLE USE DOCTRINE AFFORDS GREATER USE THAN SHARING 5% of 7Q10

It is well established in the common law of the state of New Hampshire, which is derived from old English law, that the owner of a parcel of land that abuts water has a reasonable right to use the water. This right is contingent on the use not injuring, adversely affecting, or retarding other abutters' uses. By imposing the sharing requirement, DES is altering well-established and relied upon common law. Through these rules, DES is circumventing the legislative and judicial branches of government by changing law without authorization.

The 5% of 7Q10 standard establishes what is reasonable use, a responsibility which had been left to the courts of the state since the state's inception. This nominal 5% 7Q10 de minimus sharing standard is a dramatic shift from the common law approach, which allows use up to the point of adversely affecting abutters.

In short, the sharing of 5% of 7Q10 is a dramatic shift in riparian law, because the common law reasonable use doctrine affords greater use than sharing 5% of 7Q10. The BIA believes that this rule is an excessive curtailment of reasonable water use, which is a right under the riparian common law doctrine. The BIA believes that the best approach for instream flow rules is to continue to allow reasonable use in accordance with the well-established common law.

The BIA is concerned that these rules modify reasonable use, which is a common law doctrine that the state and its businesses have grown accustom to, and have relied upon, for the past two and a quarter centuries.

Response: No Change - further discussion encouraged. The idea of a de minimis amount is an amount that is so small that most people would agree there will be no perceptible impact on instream public uses when this amount is withdrawn, no matter what the stream flow is. It is a guaranteed minimum aggregate withdrawal amount, not a "reasonable use" amount. We agree that the issue of riparian rights needs to be resolved, and will work with stakeholders on this.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1903.01**	Michael S. Giaimo - Business and Industry Association
19-Jul-01	**cwi**				

Comment: **§ 8 SUBSQUENT ADDITION OF WATER USERS NOT CONTEMPLATED IN THE RULES**

The BIA is also concerned with the fact that the amount of water allowed via the de minimus allotment would be diminished by the addition of subsequent water users. The rules make no mention, and do not provide any provisions for water use as additional users are added to a source.

Response: No Change - further discussion encouraged. The idea of a de minimis amount is an amount that is so small that most people would agree there will be no perceptible impact on instream public uses when this amount is withdrawn, no matter what the stream flow is. It is a guaranteed minimum aggregate withdrawal amount, not a "reasonable use" amount.

Env-Ws 1907.08 "Reconsideration of an Element of a Water Management Plan" is intended to allow for new users or changed water use by an existing user. See this section for proposed changes to make this clearer.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1903.01**	Ralph B. Pears – Monadnock Mountain Spring Water

13-Aug-01	**cwi**				Mountain Spring Water

Comment: By seeking to implement the proposed rules and relying upon it's own interpretation of the Doctrine of Public Trust, DES is in effect usurping the authority of the Courts, and establishing itself as the sole judge of what constitutes "reasonable use." Section Env-Ws 1903.01., which establishes a "de minimus amount of water available for use", creates a defacto standard for "reasonable use" where none previously existed. Moreover, the proposed rules would require a negotiated sharing of this resource among all affected water users during times of low flow. No such provision currently exists under the common law, and all land owners are currently afforded a Constitutionally protected and unfettered use of as much water as they wish unless and until a dispute arises and the Court determines that a level of use is not "reasonable". [. . .]

In seeking to establish a protected de minimis amount of water for use by affected water users, the proposal would set such a standard and allocate it among all current users. In doing so however, the proposal ignores the impact of future water users needs. The result would appear to be that any future increase of water use resulting from new demand (from additional "new" affected users) would reduce the de minimis amount availability for all of the previously existing users. This situation would create an. environment that would tend to thwart new business or industrial development near any of the designated rivers, and would create an advantage for communities or areas not affected by instream flow controls. Do we wish to balkanize the State of New Hampshire on the basis of instream flow conditions?

Response: No Change - further discussion encouraged. The idea of a de minimis amount is an amount that is so small that most people would agree there will be no perceptible impact on instream public uses when this amount is withdrawn, no matter what the stream flow is. It is a guaranteed minimum aggregate withdrawal amount, not a "reasonable use" amount.

We agree that the issue of riparian rights needs to be resolved, and will work with stakeholders on this.

Env-Ws 1907.08 "Reconsideration of an Element of a Water Management Plan" is intended to allow for new users or changed water use by an existing user. See this section for proposed changes to make this clearer.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1903.01**	Matthew A. Chauncey – NH Resident
16-Jul-01	**cwi**				

Comment: This is a concocted number that is arbitrary and capricious. I have not been able to substantiate its scientific basics or applicability to NH waters.

Has the 5% of 7Q10 been established for all designated rivers?

And where is it to be developed:

Mouth?

Headwater?

Every half mile of watercourse?

Arbitrary as devised by IFPFC

(capricious as to be determined)

Without riparian owner presence on committee, just as they are not represented on the WMPA.
This is a taking of rights.

Response: No Change - further discussion encouraged. The idea of a de minimis amount is an amount that is so small that most people would agree there will be no perceptible impact on instream public uses when this amount is withdrawn, no matter what the stream flow is. It is a "consensus" value, not a "scientific" value. It is a guaranteed minimum aggregate withdrawal amount, not a "reasonable use" amount.

We agree that the issue of riparian rights needs to be resolved, and will work with stakeholders on this.

Using existing stream gaging records and standard drainage area transposition methods, 7Q10 can be estimated at any location on a river. We have done this for water use locations on designated rivers. The results are on the instream flow website at http://www.des.state.nh.us/rivers/instream/studies.htm.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1903.01**	Joint Comments by AMC, Ashuelot LAC, Audubon Society of NH, Coastal Conservation Association, Coldwater Fisheries Coalition, Connecticut River Joint Commissions, Connecticut River Watershed Council, Exeter River LAC, Merrimack River Watershed Council, Merrimack Valley Paddlers, NH Rivers Council, New Hampton Conservation Commission, Pemigewasset River Council, Piscataquog Watershed Association, Society for the Protection of NH Forests, Souhegan Watershed Association
19-Jul-01	**cwi**				

Comment: The de minimis flow provision leaves little or no recourse to take action should it prove to be substantially harmful to a river. The application of the de minimis flow provision of section 1903 could cause problems with NPDES discharges and attainment of water quality goals under the Clean Water Act. NPDES permits are issued with discharge criteria designed to accommodate a dilution flow as low as 7Q10. If users are allowed to withdraw 5% of the water at or near the 7Q10 flow, necessary dilution may not occur and the concentration of pollutants may be increased to unlawful levels. This situation could make it difficult to meet the water quality standards for the receiving water body. While anti-degradation provisions of the Clean Water Act work as a safety net to address this problem, the intent of the Clean Water Act is to avoid degradation of water quality in the first place.

We believe the protected flows resulting from these rules should reinforce and be consistent with existing water quality standards, designated uses, and the Clean Water Act. We suggest the following revision:

> De minimis amount available for use. A flow equal to 5% of 7Q10 shall be a de minimis amount that is available for use, unless site-specific information concludes a more protective de minimis standard is necessary to meet water quality standards. Instream flow shall be considered to be protected if aggregate water use is below the de minimis amount.

While we are aware that recommendations have been made for implementation of a single percentage of instantaneous flow as the definition of de minimis, we find this an unworkable approach. Proper implementation would require installation of gauges at each withdrawal and return point, and monitoring and enforcement would become extremely burdensome.

Response: No Change - further discussion encouraged. The idea of a de minimis amount is an amount that is so small that most people would agree there will be no perceptible impact on instream public uses when this amount is withdrawn, no matter what the stream flow is. It is a guaranteed minimum aggregate withdrawal amount.

We have considered the issue of NPDES permitted discharges, and we believe that 5% of 7Q10 meets the de minimis definition.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1903 and 1904**	Jason R. Mulcahy – Golf Course Superintendents Association
14-Aug-01	**cwi**				

Comment: The De minimus flow and General Standard are based largely on educated speculation and not sound, scientific data. The NHGCSA feels that more time and money should be allocated to gathering true data on actual usage and flow at affected water user sites, and with the new information, create equitable values to base a new draft of the Instream Flow Rules. The EPA's 7Q10 value is something which is applied to all rivers nation wide, but it does not relate to water use. It is based on water quality and dumping of effluent water into rivers. Base values should be site specific, not nation-wide.

Response: No Change - further discussion encouraged. The idea of a de minimis amount is an amount that is so small that most people would agree there will be no perceptible impact on instream public uses when this amount is withdrawn, no matter what the stream flow is. It is a guaranteed minimum aggregate withdrawal amount.

The General Standard is not a protected instream flow, only a trigger for establishment of Protected Instream Flows and adoption of a Water Management Plan. There are no water use restrictions as a result of the General Standard. Protected Instream Flows under Env-Ws 1906 will be fully supported by scientific data and fully open to public scrutiny and comment before they become effective.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1903.01**	John Forrestall – City of Concord
14-Aug-01	**cwi**				

Comment: The City suggests that setting the "De Minimus Flow" at 5% of 7Q10 is not reasonable and will not be considered reasonable by the people whom are affected by its consequences. Using the Contoocook River as an example, the watershed contains 764 sq. miles by your table. 7Q10 is listed as 95 cfs or 61.4 MGD (both flow rates, not volumes). Five percent of 7Q10 is only 3.07 MGD and 0.5 cfsm is 382 cfs or 247 MGD. If the rule is enforced by flow rate not volume, the Contoocook River will not meet the first criteria in the general standard if Concord is using one pump. The City does not believe it is reasonable to set such a low general standard that 3.07 MGD is the limited aggregate usage rate up to a river flow rate of 247 MGD (a little less than one percent of available flow.) Furthermore, the selection of 7Q10 as the de minimus flow was not accomplished by scientific basis for any of the specific NH rivers affected by the provision. The value was determined by DES and discussed by the membership of the RMAC, which is not balanced between instream and registered user interests.

The City believes a de minimus flow value of ten percent of the available flow is reasonable, measurable and enforceable. If any registered user were limited to ten percent of the available flow at its intake point, the values of registered returns and aggregate uses is already considered and quantified.

Response: No Change - further discussion encouraged. The de minimis value was selected after review of Vermont's water use regulations. The de minimis flow is not a restriction on water use, but is a guarantee that some water would be available for offstream use regardless of streamflow conditions. The idea of a de minimis amount is an amount that is so small that most people would agree there will be no perceptible impact on instream public uses when this amount is withdrawn, no matter what the stream flow is. It is a guaranteed minimum aggregate withdrawal amount. We have re-evaluated IFIM fish habitat availability curves assembled for the November 2000 draft rules. We find that "10% in aggregate of streamflow" does not meet the de minimis requirement of "no perceptible impact" on fish habitat availability for the IFIM studies evaluated, and therefore is not a de minimis amount. Current levels of water use on most designated rivers are generally below this de minimis amount for most of the year.

The General Standard is not a protected instream flow, only a trigger for establishment of Protected Instream Flows and adoption of a Water Management Plan. There are no water use restrictions as a result of the General Standard. Protected Instream Flows under Env-Ws 1906 will be fully supported by scientific data and fully open to public scrutiny and comment before they become effective.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1903.01**	Geoff Smith and Kari Dolan - National Wildlife Federation
14-Aug-01	**cwi**				

Comment: We are also concerned that the "de minimis" water use allowed under the General Standard could undermine efforts to maintain surface water quality under low flow conditions. Section 1705.02 of New Hampshire's Surface Water Quality Regulations provides that effluent limits for discharge permits shall be calculated based on the level of treatment needed to meet water quality standards at the 7Q10 flow. This regulation recognizes the fact that dischargers rely on dilution and the river systems' assimilative capacity to meet water quality standards.

The General Standard specifically authorizes aggregate use of 5 percent of the 7Q10. If stream flows in a designated river falls below the 7Q10 level, water users will still be allowed to use 5 percent of the flow. Even though 5 percent may seem like a small amount of water, it could result in violations of water quality standards even though dischargers are meeting their effluent limits. We urge DES to include provisions in the final rule to prevent water quality standard violations during low flow periods.

Response: No Change - further discussion encouraged. The idea of a de minimis amount is an amount that is so small that most people would agree there will be no perceptible impact on instream public uses when this amount is withdrawn, no matter what the stream flow is. It is a guaranteed minimum aggregate withdrawal amount.

We have considered the issue of NPDES permitted discharges, and we believe that 5% of 7Q10 meets the de minimis definition with respect to establishment of NPDES permit limits. We note that NPDES permit limits under current practice are set such that water quality standards for some limiting parameters like dissolved oxygen would not be met if the discharger were at full capacity and the flow were less than 7Q10.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials			**1903.01**	Ross Povenmire and Allan Palmer – PSNH
20-Jul-01	**cwi**				

Comment: The de minimus amount of water available for use is too restrictive. Five percent of 7Q10 is extremely low and will often represent an amount below "reasonable use". It also does not allow for greater use when river flows are high. PSNH recommends a simple de minimus amount of ten percent of the existing river flow be made available for use at all times.

Response: No Change - further discussion encouraged. The idea of a de minimis amount is an amount that is so small that most people would agree there will be no perceptible impact on instream public uses when this amount is withdrawn, no matter what the stream flow is. It is a guaranteed minimum aggregate withdrawal amount, not a "reasonable use" amount. We have re-evaluated IFIM fish habitat availability curves assembled for the 11/14/2000 draft rules. We find that "10% of the existing river flow" does not meet the de minimis requirement of "no perceptible impact" on fish habitat availability for the IFIM studies evaluated, and therefore is not a de minimis amount.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1903.01**	Carl Deloi – EPA
20-Jul-01	**cwi**				

Comment: This part sets 5 percent of 7Q10 as a de minimus amount always available for use and considers instream flow to be protected if water use is below that amount. EPA believes that the draft rule should be modified to give DES the case by case authority to deviate from the normal allowance of 5 percent of 7Q10 where necessary to protect uses. Our reason for this is discussed further in our comments on Env-Ws 1904 General Standard for Instream Flow Protection. We note that the de minimus flow and the lowest of the general standard values are the same.

Response: No Change - further discussion encouraged. The idea of a de minimis amount is an amount that is so small that most people would agree there will be no perceptible impact on instream public uses when this amount is withdrawn, no matter what the stream flow is. It is a guaranteed minimum aggregate withdrawal amount.

Part Env-Ws 1904 GENERAL STANDARD FOR INSTREAM FLOW PROTECTION

Env-Ws 1904.01 General Standard. A general standard for instream flow protection is established for all designated rivers that do not have an established protected instream flow **under Part Env-Ws 1905**. A designated river is in compliance with the general standard ~~when~~ **if**:

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1904.01 (a) – (d)**	Jeffrey D. Mathis, P.E. – BAE Systems
10-Jul-01	**cwi**				

Comment: [W]e are concerned with the scientific methodology used to develop the aggregate water use limits listed in Env-Ws 1904.01 (a) through (d).

Response: No Change - further discussion encouraged. The general standard does not create restrictions on withdrawals. They are criteria for determining when Protected Instream Flows should be established and a Water Management Plan should be implemented.

Although there was no detailed scientific analysis used to develop the General Standard, the first tier of the standard is modeled on Vermont instream flow regulations that allow withdrawal of 5% of 7Q10 on high-quality streams. Another scientific resource used was the US Fish & Wildlife Interim Streamflow Policy for New England Streamflow Recommendations, which provides for no withdrawals when streamflow is below .5 cfsm at ungaged locations. The General Standard is not a protected instream flow, only a trigger for establishment of Protected Instream Flows and adoption of a Water Management Plan. There are no water use restrictions as a result of the General Standard. Protected Instream Flows under Env-Ws 1906 will be fully supported by scientific data and fully open to public scrutiny and comment before they become effective.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1904.01 (a) – (d)**	Robert Beaurivage and Steve Del Deo – NH Water Works Association
10-Jul-01	**cwi**				

Comment: Riparian Law. The "General Standards for Instream Flow Protection" in the revised Rules still infringe on the riparian rights of water users. The balance that is required to protect instream resources and the riparian owner's right to reasonable use of the resource is too restrictive and requires further consideration by DES, such as regulating withdrawals at flows higher than Q80. It is government's and society's responsibility to protect the public trust, but we cannot lose sight of the fact that long standing New Hampshire law allows riparian owners to use small amounts of stream flow. Allowing a small amount of withdrawal above Q80 will have negligible impact on the aquatic and biological environment.

Response: No Change - further discussion encouraged. The General Standard is only a trigger for establishment of Protected Instream Flows and adoption of a Water Management Plan. There are no water use restrictions as a result of the General Standard, so there is no infringement on riparian rights. We agree that the issue of riparian rights needs to be resolved, and will work with stakeholders on this.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1904.01 (a) – (d)**	John McPhail – Gold Star Sod Farm & Nursery, Inc.
10-Jul-01	**cwi**				

Comment: While DES's concept of a General Standard which includes this De minimis amount available for use is a step in the right direction when compared to previous draft(s) of flow rules, its lack of scientific basis for need places it in contradiction as to what is a landowners Riparian right for "reasonable use" under present New Hampshire law.

Setting standards, then establishing protected instream flows, and then preparing and instituting Water Management Plans, without the scientific data actually supporting the need puts the "cart before the horse". That's precisely what this current draft of Instream Flow Rules attempts.

There needs to be irrefutable, pre-assessing scientific data that supports what actually is a detrimental low flow situation prior to the establishment of a General Standard for Instream Flow Rules.

Response: No Change - further discussion encouraged. The General Standard is not a protected instream flow, only a trigger for establishment of Protected Instream Flows and adoption of a Water Management Plan. There are no water use restrictions as a result of the General Standard. Protected Instream Flows under Env-Ws 1906 will be fully supported by scientific data and fully open to public scrutiny and comment before they become effective.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1904.01 (a) – (d)**	Michael S. Giaimo - Business and Industry Association
19-Jul-01	**cwi**				

Comment: § 4 THE GENERAL STANDARD FOR INSTREAM PROTECTION IS TOO INCLUSIVE

The rules state that a water management plan is required if and when total consumption is greater than 80% of de minimus (=4% of 7Q10). If this threshold standard occurs even once, then a water program is needed (which is too easy a threshold to satisfy). This general standard and the need for a plan does not contemplate the fact that bigger rivers can withstand greater use and consumption. By allowing the standard to be triggered by one occurrence, coupled with same standard being applied with disregard to the size of the river, makes the general standard too inclusive. In short, the general standard can be triggered too easily, and can be applied to too many rivers.

The numbers incorporated into the general standard do not seem equitable. For example, let us use two rivers, named A and B. River A's flow is .5 cfsm, and under the general standard the aggregate use can be .02 cfsm. Now on River B, the flow is just under 4 cfsm, but the aggregate use is .04 cfsm. Notice the disproportional situation that exists under this general standard, the flow of River B is 8 times that of River A, but the aggregate use is only doubled. That does not make sense; it is disproportional, and unfair.

When the flow is higher, the amount of use should not be proportionately higher; it should be exponentially higher, because the greater the flow, the greater the amount the river can lose to consumption. When the flow is the highest, that is when the use should also be the highest. It is the BIA's opinion that the general standard needs to be recalculated, so as to better compensate for the size and use sustainability.

Response: No Change - further discussion encouraged. The 4% of 7Q10 value is not in the June 1, 2001 draft rules on which we requested comment. We would consider changes to the General Standard to address the inequities you point out. The General Standard is only a trigger to begin the process of protecting instream flow on a particular river segment. It does not result in any restrictions on water use.

We think the General Standard will be an appropriate threshold for daily water use as well as for monthly average water use. A pilot study to compare monthly and daily use is in progress on the Contoocook River.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1904.01**	Vernon Lang – US Fish and Wildlife Service
19-Jul-01	**cwi**				

Comment: This section should be revised to establish the general standards as protected instream flow under RSA 483:9-c. The first sentence should read as follows: A protected instream flow general standard is established for all designated rivers unless a site specific protected instream flow has been established under section 1906.

A new subsection (e) should be included as follows: (e) When consistent with antidegradation, other provisions in water quality standards and RSA 483. This new subsection would help clarify that other regulatory provisions may be more stringent than the general standards.

Response: No Change. The General Standard is not the Protected Instream Flow, it is only a trigger to begin the process of protecting instream flow on a particular river segment. The antidegradation provisions of the Surface Water Quality Regulations (Env-Ws 1708) can be applied to instream flow independently of these rules, using the narrative flow standard in the Surface Water Quality Regulations.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1904.01**	Joint Comments by AMC, Ashuelot LAC, Audubon Society of NH, Coastal Conservation Association, Coldwater Fisheries Coalition, Connecticut River Joint Commissions, Connecticut River Watershed Council, Exeter River LAC, Merrimack River Watershed Council, Merrimack Valley Paddlers, NH Rivers Council, New Hampton Conservation Commission, Pemigewasset River Council, Piscataquog Watershed Association, Society for the Protection of NH Forests, Souhegan Watershed Association
14-Aug-01	**cwi**				

Comment: As currently drafted, these sections establish a General Standard for instream flow protection, which can be replaced with a site-specific protected instream flow as soon as that flow is established. Since the General Standard and protected instream flow are used as limits for new or expanded uses of river water, the result of this approach is that the protected flows become the limit on new and expanded uses. Since there are no enforceable provisions in effect until management plans take effect, the rules unwisely allow use to expand to the limit of the protected flows. Once uses are permitted, there appears to be no recourse for enforcement of the limits until the water management plans are in place, and use could readily encroach on the protected flows. In addition, requirements for conservation are contained in the water management plans, yet water use could expand to the limit of the protected flows before these conservation provisions take effect.

We believe the rules should take a stronger stand on conservation and should stave off increased use until the management plans are in place. To that end, we recommend that the phrase "that do not have an established protected instream flow" be deleted from section 1904.01.

Response: No Change. The General Standard is not the Protected Instream Flow, it is only a trigger to begin the process of protecting instream flow on a particular river segment.

No permits are required for water withdrawals from surface waters. Registration and reporting are required. Our water use reporting records do not indicate that rapid increases in water use are a problem.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1904.01 (d)**	John Forrestall – City of Concord
14-Aug-01	**cwi**				

Comment: The City questions the setting of an upper limit in the general standard at 1904.01 (d). Although it is certainly a very large number, what is the point of it? Why are the general standard exceeded and the river in jeopardy if, in the example of the Contoocook, the flow exceeds 3056 cfs, but registered users are using 119 cfs (4% of available flow)?

Response: No Change - further discussion encouraged. We would consider changes to the General Standard to address the issue of withdrawals at high river flows. The General Standard is only a trigger to begin the process of protecting instream flow on a particular river segment. It does not result in any restrictions on water use.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1904.01**	Tom Chasse – Attitash Bear Peak
24-Jul-01	**cwi**				

Comment: We are deeply concerned about the merits of the general standard. The de minimis portion of the rules of 5% of 7Q10 is not unreasonable and is consistent with the State of Vermont. However, at higher flows, the allowable withdrawal drops to between 1 and 4% of available flow, depending on the actual flow, which is inconsistent with what many IFIM studies have shown about the relationship between streamflow and aquatic habitat. Most WUA curves indicate that as streamflow increases, an ever increasing percentage of water may be removed while still maintaining the same minimal impact. One could easily show by using WUA curves that if 5% of 7Q10 creates a de minimis impact (an impact which is so small as to be negligible), 10% of say 1.0 cfsm is equally de minimis and 20% of say 2.0 cfsm is equally de minimis, etc. To arbitrarily restrict withdrawals to between 1 and 4% of a very wide range of flow conditions is without scientific basis. It is generally expected that a standard of any kind has some basis in fact. While 0.5 and even 1/0 cfsm may have some biological significance, 4.0 does not. We are wondering where these numbers were derived from? The closes we can come is from the USFWS Interim Flow Policy which states the 0.5 cfsm (the average of median August monthly flow records for 48 New England streams shall be recommended as an appropriate YEAR-ROUND minimum flow, unless superceded by spawning and incubation needs. For those streams or segments of stream where spawning is considered important, minimum flows of 1.0 cfsm and 4.0 cfsm shall be recommended for the Fall/Winter and Spring periods, respectively.

The proposed NH minimum flow rules give these numbers radically different meanings. Under the USFWS interim flow rules, only 0.5 cfsm has year-round significance - 1.0 and 4.0 cfsm are significant only during the fall/winter and spring periods, respectively, and then only if important spawning habitat has been identified. With the proposed rules, 1.0 and 4.0 cfsm would be applied year-round to all designated river/streams and segments, regardless of their spawning status. This will cause certain river segments to be non-compliant with the general standard (i.e., the Upper Saco). Keep in mind that at Attitash's intake area, flow in the Saco is less than 4.0 cfsm 96% of the time during the winter period. If the rules are going to use numbers that have seasonal significance only, then they should be applied only during the appropriate season. Otherwise, DES should be looking at annual flow statistics to generate numbers that are more meaningful year-round. My primary concern is that a standard tends to become the yardstick by which everyone is measured, regardless of whether some deviation from the standard is actually expected. Because of this, the standard must be well-founded in science and as proposed, it is not.

[Continued next box]

Date of Entry	Date of Response	Rule Reference	Source of Comment

Date	initials	date	initials	**1904.01**	Tom Chasse – Attitash Bear Peak
25-Jul-01	**cwi**				

Comment: Attitash Bear Peak has engaged Pioneer Environmental Associates, LLC., of Middlebury, Vermont, to conduct a series of mass hydrograph simulations to evaluate the impact on existing water usage from the Saco River and Thorne Pond from the revised New Hampshire Instream Flow Rules. This modeling exercise utilizes a standard and accepted methodology, which has been previously developed to analyze the impacts of the proposed rules on water availability for snowmaking at Attitash Bear Peak. The model is based on a daily time step, and has been run for the winter season for the 51 years for which both daily streamflow and air temperature data are available (1949 – 1999). The model relies on a series of input/assigned values, including air temperatures, water needed for snowmaking, pumping rates and limitations due to the proposed rule.

The purpose of the modeling exercise was to determine the following:

1. The volume of water that would be available under the revised proposed rule limitations and provide a comparison of this water availability to the water need for snowmaking at Attitash Bear Peak.
2. The volume of new storage capacity that would need to be constructed to meet various system performance targets.

Here are the results of our analysis of the effect to Attitash of the implementation of the proposed June 2001 draft NHIFR. The proposed General Standard is specified in Part Env-Ws 1904.01. Based on these limitations, the aggregate water use from the Saco River at the location of the Attitash/Bear Peak withdrawal would be as follows.

For streamflows less than or equal to 50 cfs (0.5 csm) withdrawals would be limited to 567 gpm (5% of 7Q10). For streamflows less than or equal to 100 cfs (1.0 csm), and greater than 50 cfs, withdrawals would be limited to 898 gpm (0.02 csm).

For streamflows less than or equal to 400 cfs (4.0 csm), and greater than 50 cfs, withdrawals would be limited to 1795 gpm (0.04 csm). For streamflows greater than 400 cfs (4.0 csm), withdrawals would be limited to 7181 gpm (0.16 csm). Since these withdrawal volumes are basin-wide aggregates, we have subtracted from each of these withdrawal allowances the volumes of water reported by DES as withdrawn by upstream users within the Saco River watershed. These are user ID numbers 20330-S01, 20391-S01, and 20391-S02. Using the maximum monthly total water usage volumes for the winter months for these users, a total volume of 193 gpm would be subtracted from the withdrawal rates stated above. These withdrawal restrictions have been input to the water availability model previously used to evaluate the earlier NHIFR proposal dated January 8, 2001.

Here are the results.

1. With the current water storage capacity, water availability would be only 59.3% of demand (182.7 Mgal) in an 85th percentile year, and only 60.5% of demand (186.2 Mgal) in an 80th percentile year. This would result in a highly deficient snowmaking system, with respect to typical performance objectives.

2. In order to meet an "100/85" performance standard (i.e. provide at least 100% of the total water demand in at least 85% of all years), a total storage volume of 145 Mgal would be needed. This represents an increase of 120 Mgal above the existing Thorne pond water storage capacity. Thus, storage capacity approximately five times greater than the existing water storage volume would be needed to comply with the proposed standard, based on water demand for existing snowmaking coverage at Atttitash/Bear Peak. This is considerably greater than the computed additional storage requirement of 64 Mgal based on the November 2000 NHIFR proposal. I believe that the state has estimated a $0.12 per gallon cost to build such a facility which would equate to $14.4M for construction under normal conditions. Our existing land options would require a lined pond which could push this number up to $20M which would create a severe hardship for our operation considering that our annual resort revenues are only in the $10M range. Furthermore, our current landholdings would also preclude us from constructing the recommended facility due to the limitations of the 100-year floodway and we have no other suitable land.

[Continued next box]

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1904.01**	Tom Chasse – Attitash Bear Peak
25-Jul-01	**cwi**				

Comment: Based on the modeling exercise we have determined that our snowmaking efforts would be compromised on average 48 days out of 120 which means that forty percent of our typical snowmaking season would be met with great restriction, on average. While we could probably survive with an occasional reduction to our snowmaking water supply, the historical streamflow record for the Saco River indicates that the proposed rules would impose some type of flow restriction in virtually every year. In certain low flow years, we would be under severe restrictions for essentially the entire snowmaking season, at best, and at worst, we would be completely shut-off for perhaps as much as 100 days. During the early winter and winters with below normal snowfall our snowmaking system is the most critical component in our operating plan. In order to ensure a marketable product for the Christmas vacation period we begin our snowmaking efforts in early November. Our existing capabilities and historical weather tendencies allow us to cover seventy percent of our skiable terrain with a respectable surface by December 15th provided we can pump water at capacity (4500 GPM) 126 hours per week (7 days @ 18 hours per day). We have estimated that in 6 out of every 10 years the proposed rules would shut down our snowmaking operation for a period of 15 days during the month of December alone. With these types of restrictions we would lose approximately $2M in direct revenue along with our longstanding reputation for the quality and quantity of skiable terrain for the holiday period. These types of losses would force Attitash Bear Peak to reduce it's operating staff by 40% (300 employees) which would have a rippling effect throughout the Mount Washington Valley. As you can see the financial implications of the proposed rules on Attitash Bear Peak could be devastating.

Response: No Change - further discussion encouraged. The General Standard is only a trigger for establishment of Protected Instream Flows and adoption of a Water Management Plan. There are no water use restrictions as a result of the General Standard. Economic considerations are intended to be a part of the Water Management Plan. See changes to Env-Ws 1907. We appreciate your analysis and would like to work with you to further explore quantitative analysis of your snowmaking water needs in relation to stream flow.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1904.01**	Geoff Smith and Kari Dolan - National Wildlife Federation
25-Jul-01	**cwi**				

Comment: Generally speaking, we support the approach used in the General Standard. Adopting the General Standard's default values for protected instream flows means that designated rivers will receive an added level of protection now, rather than having to wait until DES completes the PIF process. In addition, the General Standard provides users with an incentive to conserve water and comply with the standard, thereby avoiding the time-consuming process of formally establishing PIFs and developing Water Management Plans. In spite of these positive aspects, we do have a number of concerns regarding the General Standard that we would like DES to address before finalizing the rule:

a. The pre-draft rules apply the General Standard to all designated river segments under the Rivers Management and Protection Program (RSA 483), regardless of their classification. We are concerned that the aggregate water use authorized under the General Standard conflicts with the provisions of RSA 483.

Specifically, RSA 483:9 provides that each river or segment that is designated as "natural" is considered an outstanding natural resource water (ONRW) under RSA 485-A:8. Currently, six of the thirteen rivers already designated under RSA 483 contain "natural" segments, and therefore, are considered ONRWs. EPA regulations (40CFR 131) and implementation guidelines require that states maintain and protect water quality in ONRWs. The guiding principle in these regulations is that ONRWs deserve the highest level of protection. However, the General Standard does not distinguish between natural rivers and the other classes of designated rivers under RSA 483.

Allowing significant water withdrawals on natural river segments conflicts with the provisions of state and federal regulations governing ONRWs. NWF recommends that DES establish a separate General Standard for "natural" rivers designated under RSA 483 or clarify how the General Standard complies with ONRW regulations.

Response: Changed Env-Ws 1906.02 to require consideration of the ORW status in recommending protected instream flows. The General Standard is not a protected instream flow, only a trigger for establishment of Protected Instream Flows and adoption of a Water Management Plan. There are no water use restrictions as a result of the General Standard. The main effect of designation as an ONRW is that under the Clean Water Act, tier 1 antidegradation provisions apply. We would deal with this issue under Env-Ws 1708, the antidegradation provisions of the Surface Water Quality Regulations. We believe that this is the intended mechanism under RSA 483.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1904.01**	Jennifer J. Patterson – Conservation Law Foundation
13-Aug-01	**cwi**				

Comment: In the second line, add "under Part Env-Ws 1905" before the period.

Response: Changed Env-Ws 1904.01

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1904.01**	Ross Povenmire and Allan Palmer – PSNH
20-Jul-01	**cwi**				

Comment: A General Standard is not necessary. This IFR represents a vast improvement over previous drafts due in large part to the elimination of arbitrary and confusing limits and formulae. This standard is the last remnant that needs to be purged. It adds complexity and controversy with no real value, and does not account for an occasional day of low flow or high use. A brief period of water use greater than de minimus should not provide cause for the extensive costs and regulatory burden associated with the preparation of the various plans and the imposition of water-use restrictions contemplated under the proposed rules, particularly where the brief exceedance is due to unusual, short-lived events unlikely to be affected by the water management plan. The standard is also misinterpreted as establishing limits on withdrawals or as being a tool to directly impose water use restrictions or bans.

With this IFR, DES has established a rule that will result in the significant study of all major watersheds, from source to sea. The purpose of the standard is to highlight problem areas and to prioritize the order in which watersheds will be managed. It is unnecessary, and can be replaced with a simple guideline that states the study of river segments will be prioritized by the highest percentages of use.

Response: No Change. Although the General Standard is only a trigger for establishment of Protected Instream Flows and adoption of a Water Management Plan and there are no water use restrictions as a result of the General Standard, we believe it provides a useful benchmark for action and a basis for prioritization. We intend to leave the details of what frequency and duration of General Standard exceedence will trigger action until we have collected and evaluated daily water use and streamflow data, a process that will take several years. The prioritization by the Department using the General Standard will take into account the duration and amount of the use exceedence.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1904.01**	Carl Deloi – EPA

20-Jul-01	**cwi**				

Comment: The draft rules set a General Standard (Part 1904) for all rivers which do not have an established protected instream flow. The general standard will be used as a guide to determine whether a protected instream flow and water management plan will be developed.

The general standard and the de minimis provision recognize the importance of natural stream flow variability in maintaining healthy aquatic ecosystems. In an overall sense, in unregulated rivers, the water use allowed by the general standard and the de minimis provision mimics the natural hydrograph. According to Poff et al.,[1] the " timing of flow events is critical ecologically because the life cycles of many aquatic species are timed to avoid or exploit flows . . . the natural timing of high or low streamflows provides environmental cues for initiating life-cycle transitions in fish such as spawning, egg hatching, rearing etc." However, at some point the quantity of flow, not just the variability, becomes important. As stated above, the rule should provide for cases where the de minimus or the general standard water use levels may be determined not to satisfy New Hampshire's surface water quality standards, including protection of designated and existing uses. An example would be the case of rivers or segments designated as natural.

RSA 483:9 states that each designated natural river or segment shall constitute an outstanding resource water (ORW). Consistent with EPA's water quality standards regulations (40 CFR 131) and implementation guidance, the state's water quality standards require water quality to be maintained and protected in ORWs. The only exception to this provision is for some limited activities that result in temporary and short-term changes in the water quality. EPA recognizes that there may be existing water use in ORWs that would possibly continue, but management of ORWs should limit new water use in accordance with the provisions referenced above and seek to reduce the influence of the existing water use over time.

It is also possible that a study to establish protected instream flows would conclude that safe guards greater that the de minimus or the general standard water use levels are necessary.

[1]. Poff ,N.L.et al., 1997, The Natural Flow Paradigm, BioScience Vol. 47, No. 11

Response: Changed. Added words in Env-Ws 1906.02 to require consideration of the ORW status in recommending protected instream flows. The idea of a de minimis amount is an amount that is so small that most people would agree there will be no perceptible impact on instream public uses when this amount is withdrawn, no matter what the stream flow situation is. So, by definition, safeguards that require restrictions below de minimis are not needed. Where flow variability is an important factor in establishment of protected instream flows, it would be identified in the protected instream flow study performed under Env-Ws 1906.

(a) Aggregate water use does not exceed 5% of 7Q10 when stream flow is less than or equal to 0.5 cfsm; ~~and~~ **or**

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1904.01 (a)**	Geoff Smith and Kari Dolan - National Wildlife Federation
25-Jul-01	**cwi**				

Comment: Section 1904.01(a) of the pre-draft rules establishes 5 percent of the 7Q10 as the low flow standard for all designated rivers. The rules state that instream flows are considered protected as long as aggregate use remains below this "de minimis" amount, regardless of how much flow is actually in the river. We are concerned that this low flow standard may not always be protective of fish, aquatic insects, and wildlife and the habitat that supports them.

Section 1703.01(c) of New Hampshire's Surface Water Quality Regulations states that surface waters shall provide for the protection and propagation of fish, shellfish, and wildlife. Section (d) of the same regulation provides that surface water quantity shall be maintained at levels adequate to protect existing and designated uses. In order to assure that the pre-draft rules are consistent with these existing regulations, we urge DES to carefully evaluate whether the "de minimis" value in the General Standard is protective of aquatic life before finalizing the rule. The DES should continue to evaluate the de minimis value, as more information on the habitat needs of native trout and other species become available.

Response: No Change - further discussion encouraged. The de minimis amount is not an instream flow standard, it is a guaranteed amount available for off-stream use. The idea of a de minimis amount is an amount that is so small that most people would agree there will be no perceptible impact on instream public uses when this amount is withdrawn, no matter what the stream flow situation is. This is a separate concept from the lowest tier of the General Standard. We are open to continued evaluation of the de minimis value. We would welcome an example of a situation in which a withdrawal of 5% of 7Q10 would have a perceptible effect on aquatic life or other instream public uses.

(b) Aggregate water use does not exceed 0.02 cfsm when stream flow is greater than 0.5 cfsm and less than or equal to 1.0 cfsm; ~~and~~ **or**

(c) Aggregate water use does not exceed 0.04 cfsm when stream flow is greater than 1.0 cfsm and less than or equal to 4 cfsm; ~~and~~ **or**

(d) Aggregate water use does not exceed 0.16 cfsm when stream flow is greater than 4 cfsm.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1904.01 (d)**	Geoff Smith and Kari Dolan - National Wildlife Federation
14-Aug-01	**cwi**				

Comment: Finally, we want to voice our support the General Standard's current limit on aggregate use when stream flows are greater than 4 cfsm. Spring high flows provide a number of important functions in a healthy river system, including flushing sediment and providing over-bank flows that benefit some fish species for spawning, recharge aquifers, and create important wetland habitat. If water users are allowed to "shave off the peaks" of the hydrograph, the important functions that channel-forming flows provide will be lost and the ecological integrity of the stream will suffer.

Response: Noted. However, we think that the General Standard could probably include additional tiers allowing greater use during spring high flows without exceeding the standard. After all, flood control structures are specifically built to " shave off the peaks". The General Standard is only a trigger for establishment of Protected Instream Flows and adoption of a Water Management Plan.

Env-Ws 1904.02 Application of the General Standard to Hydroelectric Facilities.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1904.02**	David L. Deen – Connecticut River Watershed Council
09-Jul-01	**cwi**				

Comment: CRWC feels that this would allow for long reaches of river to be entirely dewatered and should only apply to run of river facilities that do not have off river storage capacity.

Response: No Change. Bypass reaches at hydroelectric facilities are subject to establishment of Protected Instream Flows under Env-Ws 1906. This provision just means that exceedence of the General Standard in a bypass reach does not trigger the WMP process in the entire upstream watershed.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1904.02**	Kenneth D. Kimball, Ph. D. – Rivers Management Advisory Committee
09-Jul-01	**cwi**	**10-Jul-01**	**cwi**		

Comment: Since hydroelectric facilities are relatively exempt (Env-Ws 1904.02)from the five percent limit imposed, I would argue and ask that you grant **snowmaking operations** by **ski areas** similar consideration.

Any and all water drawn for snowmaking from specified rivers will eventually and sometimes swiftly make its way back into the streams as gradual melting occurs. That melting occurs all Winter long -- not just in Springtime -- often happening rapidly subsequent to snowmaking operations, due to the vagaries of our New England weather and the fickleness of Mother Nature. Basically, I have observed, as I am sure you have also: Snow today becomes runoff tomorrow (and sometimes sooner.)

Therefore, **ski areas** are only **borrowing** water from river flow briefly and then returning it swiftly. It is my contention that this temporary use of our state's river waters - with a clear implication of it returning to the flow - would cause no harm when used for snowmaking.

It is also my contention that this temporary and harmless use brings great financial benefit to the Granite State and her people, as well as providing a playground Mecca for many coming from beyond New Hampshire's borders.

May I gently point out that tourism is the Number Two "industry" in our state. The lure and allure of New Hampshire's skiways are crucial to a great many peripheral businesses, as well as their wage earners in many communities, especially in the northern part of the state where our economy is weakest.

Without snowmaking - or with diminished snowmaking capabilities - our state's ski areas might not remain competitive with those in other New England states or in the West.

Therefore, I ask that you amend your proposed regulation to allow ski areas to be exempt from the five percent limit for snowmaking purposes, much as you have done for hydroelectric facilities.

Response: No Change. Env-Ws 1904.02 does not remove hydroelectric facilities from the Water Management Planning process. This section of the rules prevents a bypass reach at a hydroelectric facility from being the sole reason for a watershed area to need a Water Management Plan. Further, unless withdrawn water is returned at the same time and place, there are instream flow impacts. Weather conditions usually do not allow snowmaking at the same time snowmelt runoff is occurring.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1913 and/or 1904.02**	John McPhail – Gold Star Sod Farm & Nursery, Inc.
10-Jul-01	**cwi**				

Comment: I would also respectfully request that the following be added as a PART: COMPLIANCE BY AGRICULTURAL USERS - that the commissioner shall issue a notice in writing to the agricultural user that the commissioner will not take action against the agricultural user to compel compliance with the rule(s) or to impose penalties for failing to comply if the state has not provided nor will provide funding to the agricultural user in order that the agricultural user can afford to comply with the Rule(s).

Response: No Change. The provisions of article 28-a of the Constitution apply only to political subdivisions of the state.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1904.02**	Richard A. Norman – Granite State Hydropower Assoc.
27-Jul-01	**cwi**				

Comment: GSHA believes that section Env-Ws 1904.02 of the Proposed Rules does not and will not properly recognize the legal rights of owners of those GSHA projects which hold FERC exemptions. For these projects, the proposed rules state that the department shall establish the U.S. Fish and Wildlife Service Interim regional Policy for Aquatic Base Flow as the minimum release in any water quality certification, permit or approval after 30 years from the date of rule adoption or after the facility's existing power purchase contract expires, whichever is earlier, unless a different minimum release is required under a Water Management Plan. GSHA believes that each exempted project is governed by the specific provisions of each project's existing FERC exemption and that there is no basis in law for the rules applicability to commence upon the expiration of a power contract.

With regard to licensed projects, GSHA understands that US Fish and Wildlife policy with regard to Aquatic Base Flow allows site specific studies to justify lower flow requirements, provided that such studies establish that water quality and fish resources are not adversely affected. GSHA hopes that the proposed rules will be similarly administered so that fact based determinations will be made rather than a rote administration of the regulations.

Response: No Change - further discussion encouraged. We do not believe that a federal FERC exemption pre-empts state law or rules. There may be ambiguity here that will require adjudication at some point. Our intent is to include hydroelectric facilities fully in the Water Management Plan process so that rote application of ABF does not occur. We expect this will benefit hydroelectric operators, as well as possibly other water users while protecting instream uses.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1904.02**	Ross Povenmire and Allan Palmer – PSNH
20-Jul-01	**cwi**				

Comment: The relationship between the draft instream flow rules, the existing water quality certificate requirements and the FERC hydroelectric licensing process and requirements should be clarified. The draft rules would impose the US Fish and Wildlife Service Interim Regional Policy for Aquatic Base Flow as a minimum release requirement for hydroelectric dams in any water quality certification, permit or approval after expiration of the license in effect at the time of rule adoption. The relationship between the US Fish and Wildlife Service Interim Regional Policy for Aquatic Base Flow and the current state water quality certificate regulations regulating the discharge of pollutants is not clear. The proposed relationship between the FERC hydroelectric licensing process and requirements and the proposed development of dam and water management plans is also not clear. In the absence of a specific proposal describing how the state instream flow regulations, water quality certificate regulations and the FERC licensing requirements and process are intended to interface, it is impossible to project the likely impact on federally licensed hydroelectric projects and comment effectively on the draft rules.

Response: No Change. Env-Ws 1904.02(b) calls for the Department to use ABF unless a different flow has been required as part of an adopted Water Management Plan. This means that the Water Management Plan provisions will supercede ABF. Thus expeditious adoption of Water Management Plans will be a benefit to hydroelectric facilities, because a more site-specific required release than ABF may be the result.

(a) The General Standard shall not apply to hydroelectric facilities for the river locations between the point of withdrawal and the point of return.

(b) For hydroelectric energy facilities licensed by the Federal Energy Regulatory Commission on designated rivers, the department shall establish the US Fish and Wildlife Service Interim Regional Policy for Aquatic Base Flow as the minimum release in any water quality certification, permit, or approval after expiration of the license in effect at the time of rule adoption, unless a different minimum release is required under a Water Management Plan.

(c) For hydroelectric energy facilities granted an exemption from the Federal Energy Regulatory Commission licensing process on designated rivers, the department shall establish the US Fish and Wildlife Service Interim Regional Policy for Aquatic Base Flow as the minimum release in any water quality certification, permit, or approval after 30 years from the date of rule adoption or after the facility's existing power purchase contract expires, whichever is earlier, unless a different minimum release is required under a Water Management Plan.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1904.02 (c)**	David L. Deen – Connecticut River Watershed Council
09-Jul-01	**cwi**				

Comment: 30 years is an awfully long time for a facility to be grandfathered. CRWC feels that the rule should apply immediately unless there is a pre-existing state issued 401 permit that allows for a different withdrawal/bypass. The rule should apply when any existing state permit expires or within 5 years of the issuance of the original permit or the issuance of these rules.

Response: No Change. The issue of flows in bypass reaches at FERC-exempt facilities is one that the Department proposes to address on a facility-by-facility basis after rule adoption, as protected instream flows are established and water management plans are adopted.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1904.02** (b) and (c)	Vernon Lang – US Fish and Wildlife Service
19-Jul-01	**cwi**				

Comment: In the last line of each of these subsections pertaining to hydroelectric facilities, I would suggest deleting the word "different" and replacing it with the word "higher". The Service would not look favorably on a provision that would attempt to lower existing minimum flow releases at existing licensed or exempted hydroelectric facilities. While we believe that minimum flows at many projects should be higher, we do not believe that any should be lower and therefore, request that the word change be made.

Response: No Change. A major premise underlying the rules is that reach-specific analyses and establishment of protected instream flows will be used. ABF is a standard-setting method that may not be applicable if better, more site-specific determinations of protected instream flows are available. Site-specific studies may lead to greater- or lesser-protected flows than ABF. Our analysis of PHABSIM models on New England Rivers shows that more instream flow does not always result in better fish habitat conditions.

Part Env-Ws 1905 PROTECTED INSTREAM FLOWS AND WATER MANAGEMENT PLANS

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1905.01 through 1905.03**	John McPhail – Gold Star Sod Farm & Nursery, Inc.
10-Jul-01	**cwi**				

Comment: Following a scientifically supported General Standard, I would propose the following changes:
1. Env- Ws 1905.01 (a). — Change to read: A designated river is not in compliance with the scientifically supported general standard: or
2. Env- Ws 1905.01 (b) — Change to read: The commissioner determines that a proposed or potential water withdrawal or other flow alteration **will** cause an adverse effect...
3. Env- WS 1905.02 (c) (5) - Change to read: Scientific data in support of the request
4. Env- Ws 1905.03 — Change to read: The commissioner shall establish scientifically supported protected instream flows on a designated river prior to adoption of the water management plan for the upstream watershed.

Response:
1. No change. The General Standard serves as a trigger for site-specific, scientific studies. It is not based on detailed science, nor is this needed. The General Standard is not a protected instream flow, only a trigger to start the process for establishing protected instream flows
2. Changed.
3. No change.
4. Changed.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**Part 1905**	Vernon Lang – US Fish and Wildlife Service
19-Jul-01	**cwi**				

Comment: I recommend inserting the words "study based" or "site specific" in front of the phrase protected instream flow. This change is necessary to differentiate between protected instream flows established by the standard setting general standards and those established by the site specific or study based approach. These changes should be made throughout the draft rule to maintain consistent application of general standards and study based standards as protected instream flows.

Response: Changed Env-Ws 1905.01.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1905.03**	Carl Deloi – EPA
20-Jul-01	**cwi**				

Comment: EPA agrees with other reviewer that the words site specific or study based should precede the phrase "established protected instream flow" throughout this section.

Response: Changed Env-Ws 1905.01.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**Parts 1905 and 1906**	Jennifer J. Patterson – Conservation Law Foundation
20-Jul-01	**cwi**				

Comment: As a general comment, CLF notes that the Department's actions under Part 1905 and Part 1906 are legislative-type decisions, rather than adjudicative decisions. In 1992, the New Hampshire Supreme Court distinguished the two types of agency decisions and held that hearings on whether to ban jet skis from particular lakes were not "contested cases" triggering the adjudicative provisions of RSA 541-A. Appeal of Toczko, 136 N.H. 480 (1992). The Court noted that "[n]ot all agency actions that affect legal rights, duties, or privileges are contested cases. Legislative-style rulemaking decisions or declaratory rulings, while affecting legal rights, duties, or privileges, are not required by law to be determined by adjudication." Id. at 485. While both types of hearings must be conducted in accordance with RSA 541-A, and both are subject to appeal, different sections of the statute apply to the different types of decisions. It would be helpful if the procedures established under the rules reflected this distinction more clearly.

Response: Changed Env-Ws 1905.02(e) thru (g) and Env-Ws 1906.05(f) thru (i) and

Env-Ws 1905.01 Establishment of Protected Instream Flows and Preparation of Water Management Plans. The commissioner, in consultation with the IFPAC, shall establish **scientific, study-based,** protected instream flows on a designated river and adopt a water management plan for the WMPA if:

(a) A designated river is not in compliance with the general standard; or

(b) The commissioner determines that a proposed or potential water withdrawal or other flow alteration ~~is likely to~~ **will** cause an adverse effect on any public instream use ~~on~~ **of** a designated river.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1905.01**	Geoff Smith and Kari Dolan - National Wildlife Federation
14-Aug-01	**cwi**				

Comment: Another critical component of the pre-draft rules is the Protected Instream Flows (PIF) requirement. Section 1905.01 of the rules provides that DES shall establish a Protected Instream Flow whenever aggregate water use on a designated river exceeds the General Standard, or when a pre-draft water withdrawal is likely to cause adverse effects on any public instream use on a designated river. NWF supports this provision of the rules and requests that DES carefully consider habitat needs of fish and other aquatic life when conducting the PIF studies under Section 1906.

Response: Noted.

Env-Ws 1905.02 Request to Establish Protected Instream Flows.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1905.02**	Jasen Stock – NH Timberland Owners Assoc.
19-Jul-01	**cwi**				

Comment: Request To Establish Instream Flows - NHTOA is requesting the Department drop Section 1905.02 from the proposed rules. NHTOA believes the Department has the technical expertise to judge whether a river designated under RSA 483 should have instream flow protection. Leaving these decisions to the discretion of the public is not appropriate.

Response: Added (g), criteria for granting the request. The language of Env-Ws 1905.02 provides the public opportunity to request establishing protected instream flows. The Department makes the decision.

(a) The commissioner shall consider establishing protected instream flows on a designated river and adopting a water management plan for the WMPA upstream of a designated river if a person requests establishment of protected instream flows.

(b) The request shall be in writing.

(c) The request shall include:

(1) The name, address and daytime telephone number of the person requesting establishment of protected instream flows;

(2) If the person requesting is not an individual, the name of an individual who can be contacted on behalf of the requesting organization;

(3) The reasons establishment of protected instream flows is being requested;

(4) The **applicability of the** factors identified in RSA 483:1, RSA 483:6, IV(a), and RSA 483:9-**c to the river for which establishment of a protected instream flow is being requested**;

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1905.02 (c) (4)**	Jennifer J. Patterson – Conservation Law Foundation
13-Aug-01	**cwi**				

Comment: Rewrite to read "The applicability of the factors identified in RSA 483:1, RSA 483:6, IV(a), and RSA 483:9-c to the river for which establishment of a protected instream flow is being requested." (Underlined portions are new).

Response: Changed Env-Ws 1905.02(c)(4).

(5) Data in support of the request.

(d) Within 30 days of receiving a request, the commissioner shall either grant or deny the request.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	1905.02 (d)	David L. Deen – Connecticut River Watershed Council
09-Jul-01	**cwi**				

Comment: CRWC feels there should be some sort of recess ability built into this process. There may be good a sufficient reasons for a review to take longer than 30 days and all the parties might very well agree to more time. The way this is written there is no flexibility.

Response: Added (g), criteria for granting the request. No Change to include recess option in the process. As the decision will be based on information presented in the request, and other information readily available, we do not foresee need for lengthy review.

(e) If the commissioner believes that an oral hearing would facilitate making a decision to deny or grant the request, the commissioner shall:

(1) Schedule a hearing; and

(2) Notify the person **who made the request, any other person who has requested to be notified, and the general public** of the date, time and place of the hearing.

(f) Any hearing so scheduled shall be conducted in accordance with ~~RSA 541-A and~~ Env-C 20~~0~~**5 relative to non-adjudicative public hearings**.

(g) The commissioner shall grant the request if the information in the request or other information reviewed by the commissioner indicates that instream flows do not support an instream public use or a resource for which the river or segment is designated.

(h) ~~If the commissioner denies the request,~~ **The commissioner's decision shall**:

(1) ~~Notify the person~~ **Be in writing** ~~of the denial~~; ~~and~~

(2) Be sent to the person who requested the instream flow to be established and to any other person who has asked to be notified of the decision in writing;

(3) Be made available electronically to the general public; and

(~~2~~**4**) State the reason(s) for the ~~denial~~ **decision, whether the decision is to deny the request or to establish protected instream flows**.

(**i**) If the commissioner grants the request, the commissioner shall~~:~~

~~(1) Notify the person in writing that protected instream flows will be established; and~~

~~2)~~ ~~I~~initiate the process for establishment of protected instream flows**, within 30 days of the decision, by the process in Env-Ws 1906.**

Env-Ws 1905.03 Sequence. The commissioner shall establish **scientifically supported** protected instream flows on a designated river prior to adoption of the water management plan for the upstream watershed.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1905.03**	Jasen Stock – NH Timberland Owners Assoc.
19-Jul-01	**cwi**				

Comment: Sequence – Section 1905.03 of the proposed rules has the Department establishing protected instream flows on a designated river prior to the adoption of the water management plan for the upstream watershed. NHTOA urges the Department to reconsider this strategy since the data collected through the water management plan will enable the Department to evaluate the impacts of any withdrawal restrictions to New Hampshire businesses.

Response: No Change - further discussion encouraged. The process of establishing protected instream flows is intended to be independent of economic considerations, and based only on the flow requirements of instream public uses and resource for which the river or segment is designated. We are considering adding economic considerations. See annotations to Env-Ws 1907.

Env-Ws 1905.04 Issuance of ~~401~~ Water Quality Certifications**, Permits, and other Project Approvals.**

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1905.04**	Joint Comments by AMC, Ashuelot LAC, Audubon Society of NH, Coastal Conservation Association, Coldwater Fisheries Coalition, Connecticut River Joint Commissions, Connecticut River Watershed Council, Exeter River LAC, Merrimack River Watershed Council, Merrimack Valley Paddlers, NH Rivers Council, New Hampton Conservation Commission, Pemigewasset River Council, Piscataquog Watershed Association, Society for the Protection of NH Forests, Souhegan Watershed Association
14-Aug-01	**cwi**				

Comment: Finally, for consistency's sake, the title of section 1905.04 should read "Issuance of 401 Water Quality Certifications and Other Permits and Approvals." This change would make the section title consistent with the language under 1905.04(a) that prohibits the state from issuing water quality certifications, permits and other project approvals if they are inconsistent with the General Standard or protected instream flow.

Response: Changed Env-Ws 1905.04

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1905.04**	Tom Chasse – Attitash Bear Peak
24-Jul-01	**cwi**				

Comment: Although it is probable that it will be several years, perhaps even a decade, before Attitash would be directly affected by these rules, other impacts could be more swift. For example, for non-compliant rivers such as the Upper Saco, no new or increased withdrawals would be allowed before the Water Management Plan is adopted. This would potentially restrict Attitash's development of new terrain and perhaps numerous other potential uses by both Attitash and others. (It is not clear how DES would determine existing use for Attitash, given the wide range in actual use on a daily, monthly and annual basis.)

Response: No Change - further discussion encouraged. The intent of this provision is to provide an incentive to develop a Water Management Plan. We are open to ideas for alternative incentives. We do not think this provision adds new restrictions to permit applicants. For example, an analysis of instream flow impacts is required under the Large Groundwater Withdrawal Rules, and would be required under the 401 Water Quality Certification process for any direct withdrawal from the river, even without the rules.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1905.04**	Ross Povenmire and Allan Palmer – PSNH
20-Jul-01	**cwi**	**25-Jul-01**	**cwi**		

Comment: It is unreasonable to prohibit all 401 water quality certifications, permits, and approvals for all projects and activities because a Water Management Plan is incomplete. This provision has far reaching implications and could have a dramatic impacts on other permitting programs, e.g., NPDES and wetlands, that have little or no additional impact on instream flow. This represents a heavy hammer that DES does not need to wield in building a successful IFR.

Response: No Change - further discussion encouraged. This provision does not prohibit 401 water quality certifications, permits, and approvals. The intent of this provision is to provide an incentive to develop a Water Management Plan. We are open to ideas for alternative incentives. The lack of a completed Water Management Plan will not prohibit 401 certifications or permits where water use can be negotiated, timed, or augmented using appropriate infrastructure so as not to exceed the General Standard. This section only requires the Department to place the condition of no increased water use from rivers as conditions on certifications, permits, and approvals.

(a) When a Water Management Plan is required under Env-Ws 1905.01 ~~but not adopted~~ **and protected instream flows have not been established under 1906**, the department shall not issue any water quality certification, permit, or approval for any project or activity that would result in increased water use during times when the designated river is not in compliance with the General Standard.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1905.04 (a)**	Jennifer J. Patterson – Conservation Law Foundation
13-Aug-01	**cwi**				

Comment: In the first line, rewrite the section following "1905.01" to read "but has not yet been finally adopted," (Underlined portions are new).

Response: Changed section text in response to another comment by deleting this phrase.

(b) For a designated river that is in compliance with the General Standard, the department shall not issue any water quality certification, permit, or approval for any project or activity that would cause the river to become noncompliant unless ~~a Water Management Plan has been adopted~~ **protected instream flows have been established under 1906**.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1905.04 (b)**	Vernon Lang – US Fish and Wildlife Service
19-Jul-01	**cwi**				

Comment: I suggest inserting the following language after the word "unless" on the last line of this subsection: the project or activity is consistent with antidegradation, other provisions in the water quality standards and RSA 483 and a Water Management Plan has been adopted. These changes would help clarify and illustrate that other regulatory factors need to be considered in addition to water management plans.

Response: No change. Antidegradation provisions are part of the water quality standards, and compliance with the standards and the law in RSA 483 is required regardless. The intent of 1905.04(b) is to encourage work on Water Management Plans.

(c) For a designated river with ~~established~~ protected instream flows **established under Env-Ws 1906**, all water quality certifications, permits or approvals issued by the department shall require maintenance of the established protected instream flows.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1905.04 (c)**	Vernon Lang – US Fish and Wildlife Service
19-Jul-01	**cwi**				

Comment: Suggest amending the phrase "established protected instream flow" by inserting the words site specific or study based immediately preceding the phrase. This change is necessary to insure that both general standards and study based instream flow standards are recognized as protected instream flow under RSA 483:9-c.

Response: No change. Under these rules, the only protected instream flows established are site specific ones, so adding "site specific" would be redundant. Your comment that the general standard is a protected instream flow is not correct. The general standard serves as a trigger for action to establish protected instream flows - it is not a protected instream flow.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1905.04 (c)**	Joint Comments by AMC, Ashuelot LAC, Audubon Society of NH, Coastal Conservation Association, Coldwater Fisheries Coalition, Connecticut River Joint Commissions, Connecticut River Watershed Council, Exeter River LAC, Merrimack River Watershed Council, Merrimack Valley Paddlers, NH Rivers Council, New Hampton Conservation Commission, Pemigewasset River Council, Piscataquog Watershed Association, Society for the Protection of NH Forests, Souhegan Watershed Association
14-Aug-01	**cwi**				

Comment: As currently drafted, these sections establish a General Standard for instream flow protection, which can be replaced with a site-specific protected instream flow as soon as that flow is established. Since the General Standard and protected instream flow are used as limits for new or expanded uses of river water, the result of this approach is that the protected flows become the limit on new and expanded uses. Since there are no enforceable provisions in effect until management plans take effect, the rules unwisely allow use to expand to the limit of the protected flows. Once uses are permitted, there appears to be no recourse for enforcement of the limits until the water management plans are in place, and use could readily encroach on the protected flows. In addition, requirements for conservation are contained in the water management plans, yet water use could expand to the limit of the protected flows before these conservation provisions take effect.

We believe the rules should take a stronger stand on conservation and should stave off increased use until the management plans are in place. To that end, we recommend that the phrase "that do not have an established protected instream flow" be deleted from section 1904.01. In addition, sections 1905.04(c) and 1910(e) should be deleted. The effect of these changes would be to maintain the General Standard as the applicable limit on increased water use until water management plans are in place (at which time the protected instream flow would become the new limit on water use).

Response: No change. We intend to use the established protected instream flows in administering Env-Ws 1905 and the water quality standards, as soon as the protected flows are established. This would place the burden of maintaining protected flows on permit applicants until the Water Management Plan is completed. Env-1904.04(c) is important for implementation of established protected flows because it requires maintenance of established protected instream flows in all Department actions. Similarly Env-Ws 1910.01(e) requires reporting of failure to maintain any established protected instream flows.

Part Env-Ws 1906 PROCEDURE FOR ESTABLISHMENT OF PROTECTED INSTREAM FLOWS

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**Part 1906**	David L. Deen – Connecticut River Watershed Council

09-Jul-01	**cwi**				Watershed Council

Comment: CRWC is concerned that the commissioner must conduct an individual study on each reach of river nominated. The concern is resources at NHDES to carry out the studies. If NHDES cannot carry out the study the in stream flows cannot be set. The main question becomes will the legislature and administration make the resources necessary to conduct the studies available to NHDES. If not then the stream will not be protected from excessive water withdrawals pending the completion of the study.

Response: No Change. Funding is a critical issue. Our plan is to find public funding, probably from a combination of state and federal sources. Ultimately, if the will of the people is to implement protection of instream flow for NH's designated rivers, funding will be found. We are optimistic.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**Part 1906**	Vernon Lang – US Fish and Wildlife Service
19-Jul-01	**cwi**				

Comment: In accordance with the comments above, this section should be modified to recognize more clearly that a protected instream flow can be established by the general standards in section 1904 or by a study based approach in this section. It should be made clear in the rule making process that the current public involvement process is intended to comply with the requirements in RSA 483:9-c to establish the general standards in section 1904 as protected instream flow. The remaining procedures in this section should be modified to indicate that these procedures apply to study based or site specific approaches for determining protected instream flow levels.

Response: No change. The General Standard is not a protected instream flow, only a trigger.

Env-Ws 1906.01 Elements. To establish protected instream flows**, as required by Env-Ws 1905.01 or 1905.02,** the commissioner shall:

(a) Conduct a Protected Instream Flow Study and propose protected instream flows **based on scientifically accepted ecological methods and** as provided in Env-Ws 1906.02.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1906.01 (a)**	Joint Comments by AMC, Ashuelot LAC, Audubon Society of NH

14-Aug-01	**cwi**				LAC, Audubon Society of NH, Coastal Conservation Association, Coldwater Fisheries Coalition, Connecticut River Joint Commissions, Connecticut River Watershed Council, Exeter River LAC, Merrimack River Watershed Council, Merrimack Valley Paddlers, NH Rivers Council, New Hampton Conservation Commission, Pemigewasset River Council, Piscataquog Watershed Association, Society for the Protection of NH Forests, Souhegan Watershed Association

Comment: This section should more clearly delineate acceptable methods for establishing a protected instream flow. In particular, we believe that objective and biologically sound investigations should be the framework of every method for establishing protected flows. In addition, in order to be consistent with the Clean Water Act designated uses and the state's water quality standards, the procedure for establishing protected instream flows must meet biological and ecological needs of the river. We recommend that 1906.01 (a) read "Conduct a Protected Instream Flow Study and propose protected instream flows based on scientifically accepted ecological methods and as provided in Env-Ws 1906.02."

Response: Changed Env-Ws 1906.01(a).

(b) Make the study available for public review;

(c) Hold a public hearing and receive comments on the ~~Study~~ **study** and the recommended Protected Instream Flows as provided in Env-Ws 1906.03; and

(d) Issue a decision establishing protected instream flows for the designated river, as provided in Env-Ws 1906.04.

Env-Ws 1906.02 Protected Instream Flow Study. The Protected Instream Flow Study shall:

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1906.02**	Vernon Lang – US Fish and Wildlife Service
19-Jul-01	**cwi**				

Comment: Recommend that these subsections be clarified to recognize that no instream flow (g) and (h) method would be needed for rivers/segments classified as natural rivers under RSA 483:7-a and 483:9V. The flow criteria for this category of waters is established by statute and antidegradation policy to be naturally occurring flow. Accordingly, neither general or study based flow standards are applicable. Note: the subsection (g) referred to above is the second subsection (f) in my copy of the draft rule which I have renumbered to be (g).

Response: No change. RSA 483:7-a.I(a)(4) specifically provides for water use by riparian owners and others. We intend to consider and prepare a policy on the instream flow implications of designation by RSA 483:9.IV of natural rivers as outstanding natural resource waters.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1906.02**	Jasen Stock – NH Timberland Owners Assoc.
19-Jul-01	**cwi**				

Comment: Subjectivity in Establishment of Protections for Instream Flows - Many of the criteria used by the Department to study the need for protection of instream flows in section 1906.02 of the proposed rule are subjective and open to interpretation. The NHTOA requests the Department provide more insight into how they will weigh the factors listed in Section 1906.02. NHTOA also requests the Department specifically consider under 1906.02(b)(11) “community significance” the river’s economic importance.

Response: No Change
1) To the extent possible, objective criteria will be developed and explained in the protected instream flow study. Critique of the criteria will be open to full public discussion by the process in Env-Ws 1906.03-05.
2) By definition, economics are not a consideration in establishment of protected instream flows. The only considerations are for protection and support of "instream public uses". However, economics are a part of the Water Management Plan. See annotations under Env-Ws 1907.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1906.02**	Geoff Smith and Kari Dolan - National Wildlife Federation
14-Aug-01	**cwi**				

Comment: Recognizing these habitat needs when establishing PIFs is particularly important in light of the introductory language of the rule. Section 1901.01 states that the purpose of the rules is to establish protected instream flows in order to protect the resources for which the river was designated. While fish and wildlife are included among the resources to be protected in the 13 rivers already designated, that may not always be the case in the future. Section 1906.02 of the pre-draft rules identifies the various characteristics of the designated rivers that the Commissioner shall consider when adopting a PIF. These characteristics include agricultural, historical, and public water supply.

It is certainly conceivable water users could petition the Commissioner to designate a river under RSA 483 for agricultural or public water supply reasons, and request that he or she establish a PIF that protects those uses. A PIF that only considers those uses is not likely to provide adequate protection for other values in the stream corridor, including fish, aquatic insects, and wildlife. We urge DES consider the needs of fish and other aquatic life in adopting the general standard as well as adopting PIF under section 1906.01, and during the appeals process set forth in section 1906.05 of the pre-draft rules. We also recommend that DES include language in the final rules that requires any PIF adopted under section 1906 to protect all existing and designated uses of the river, not just those for which the river was designated.

Response: No Change. The designated river provisions of RSA 483 are intended to "complement and reinforce existing state and federal water quality laws (RSA 483:2)". Thus aquatic life support and recreation are always included in the list of instream public uses for a designated river or segment, under Env-Ws 1906.02(c).

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1906.02**	Carl Deloi – EPA
20-Jul-01	**cwi**				

Comment: The process for setting protected instream flows (Part 1906.02) would benefit from a more specific reference to maintaining natural flow variability as is provided by the general flow standard. We cited work of Poff et al earlier. Stalnaker[2] also speaks to seasonal (intra-annual) and long term (inter-annual) stream flows and states that their maintenance is key to the establishment of an ecologically based instream flow standard. Such information should be used to help establish protected instream flows at Part 1906.04.

[1] Stalnaker, Clair B., "Ecologically Based Instream Flow Standards in River Management, The Future of Flow: Instream Protection Issues and Approaches in the Eastern United States, April 2001 and also at the March 23, 2001 Connecticut Instream Flow Conference, Berlin Connecticut.

Response: No change. We agree that flow variability is a factor in protected instream flows for some instream public uses. Where applicable, this will be identified and quantified in the protected instream flow study.

(a) Identify and catalog segments, as defined by RSA 483:7A, on the designated river;

(b) For each segment, identify and catalog outstanding characteristics under RSA 483:1, including:

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	1906.02 (b)	Ross Povenmire and Allan Palmer – PSNH
20-Jul-01	**cwi**				

Comment: Economic use and energy supply should be included in the list of outstanding characteristics to be protected. The list of outstanding characteristics to be protected by the draft rule does not include economic uses of the designated river, even though the statute referenced in this section emphasizes that "[i]t is the policy of the state to ensure the continued viability of New Hampshire rivers as valued **economic** and social assets . . .". Although economic use may fall within the definition of "community significance", "historical", "agricultural", or "other", these categories do not adequately capture the economic and social significance of New Hampshire business and industries that rely upon designated rivers for water supply. Similarly, energy production is highly dependent upon water supply and is critical in maintaining the State's infrastructure and protecting human health and the environment.

Response: No change. This list comes from RSA 483:1. We think the rulemaking scope should generally stay within the statutory language. We note that item (14) - other outstanding characteristics - would allow some flexibility to consider economic use and energy supply if documentation exists.

(1) recreational;

(2) fisheries;

(3) wildlife;

(4) environmental;

(5) cultural;

(6) historical;

(7) archaeological;

(8) scientific;

(9) ecological;

(10) aesthetic;

(11) community significance;

(12) agricultural;

(13) public water supply; and

(14) other outstanding characteristics;

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1906**	Michael S. Giaimo - Business and Industry Association
20-Jul-01	**cwi**				

Comment: § 7 BUSINESS AND ECONOMIC CONSIDERATIONS SHOULD BE FACTORED INTO FLOW STUDIES Throughout the rules, there is no contemplation or factoring in of business or economic considerations. The BIA believes that business and economic issues and concerns should be incorporated into the rules, so as to identify the business community and their needs, which are not mutually exclusive with the specifically enumerated factors. In particular, economic, business and energy needs and concerns should be included in the list of factors considered in the Protected Instream Flow Study, Env-Ws 1906.

Response: No change. By definition, economics are not a consideration in establishment of protected instream flows. The only considerations are for protection and support of "instream public uses". However, economics are a part of the Water Management Plan. See annotations under Env-Ws 1907.

(c) For each segment, identify and catalog all instream public uses on the designated river under RSA 483:9-c.I, including:

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1906.02 (c)**	Ross Povenmire and Allan Palmer – PSNH
20-Jul-01	**cwi**				

Comment: <u>The listing of uses of designated rivers should include economic and other riparian uses</u>. The draft rule only lists public uses for consideration in setting instream flow rates. The statute referenced in this section, however, requires an assessment of instream flow restrictions upon “hydroelectric power generation, water supply, flood control, and **other riparian** users”. Any listing of uses to be considered in setting instream flow rates must therefore include such riparian uses. In addition, many communities owe their founding and/or continued existence to businesses or industries that rely upon designated rivers for water. The continued viability of these businesses and industries is a vital public concern and communal necessity, and is properly considered as a public use of the resource.

Response: No change. This list comes from RSA 483:9-c.I. We think rulemaking should generally stay within the statutory language. We note that item (14) - other instream public uses - would allow some flexibility to consider riparian uses if documentation exists that they are instream public uses. Env-Ws 1906.02(~~h~~**j**) addresses the statutory provisions you reference.

(1) navigation;

(2) recreation;

(3) fishing;

(4) storage;

(5) conservation;

(6) maintenance and enhancement of aquatic and fish life;

(7) fish and wildlife habitat;

(8) wildlife;

(9) the protection of water quality and public health;

(10) pollution abatement;

(11) aesthetic beauty;

(12) designated uses under the federal Clean Water Act

(12~~3~~**3**) hydroelectric energy production; and

(13~~4~~**4**) other instream public uses;

(d) For each segment, identify and catalog all resources for which the river or segment is designated pursuant to RSA 483:6 IV a, being those resources identified in river nomination reports and documents or river designation legislation**, including**;

(1) Scenic or recreational resource;

(2) Open space or natural resource;

(3) Fisheries, wildlife, vegetation, and rare species or habitat;

(4) Cultural, historical, or archaeological resource;

(5) Hydrological or geological resource;

(6) Water quality;

(7) Scientific resource;

(8) Community resource;

(9) Current and projected withdrawals, discharges, or both, by public utilities and commercial or industrial users; and

(10) Other resources for which the river or segment is designated.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1906.02 (d)**	Ross Povenmire and Allan Palmer – PSNH
20-Jul-01	**cwi**				

Comment: The listing of river resources should include all pertinent values and characteristics, including economic uses. This section of the draft rule emphasizes consideration of all river "resources" identified in river nomination reports or river designation legislation in establishing protected instream flows. The statute referenced in this section, in addition to resources, lists "current and projected withdrawals, discharges, or both, by public utilities and commercial or industrial users" as a pertinent characteristic to be included in deciding whether or not to designate a river for protection. This characteristic should thus be considered in setting instream flows.

Response: Changed Env-Ws 1906.02(d). Added the statutory list in RSA 483:6.IV(a).

(e) Identify and catalog all documents and reports relative to a segment's outstanding characteristics, the resources for which the river is designated, and instream public uses, including:

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1906.02 (e)**	Ross Povenmire and Allan Palmer – PSNH
20-Jul-01	**cwi**				

Comment: The listing of river resources should include all pertinent values and characteristics, including economic uses. This section of the draft rule emphasizes consideration of all river "resources" identified in river nomination reports or river designation legislation in establishing protected instream flows. The statute referenced in this section, in addition to resources, lists "current and projected withdrawals, discharges, or both, by public utilities and commercial or industrial users" as a pertinent characteristic to be included in deciding whether or not to designate a river for protection. This characteristic should thus be considered in setting instream flows.

Response: No change. By definition, economics are not a consideration in establishment of protected instream flows. The only considerations are for protection and support of "instream public uses". However, economics are a part of the Water Management Plan. See annotations under Env-Ws 1907.

(1) designated river nomination reports;

(2) river corridor management plans;

(3) water quality studies;

(4) natural heritage inventory;

(5) fishery and aquatic resource studies;

(6) environmental assessments;

(7) environmental impact statements; and

(8) other available reports and documents;

(f) Include an on-the-water stream survey of all resources, which identifies and catalogs from direct observation:

(1) fish;

(2) wildlife;

(3) macroinvertebrates;

(4) plants;

(5) recreational use;

(6) characteristics catalogued in (b) above; and

(7) instream public uses catalogued in (c) above;

(~~f~~**g**) Identify and document method(s) for establishing a protected instream flow on segments for the most sensitive instream public use or resource identified in (c) and (d) above, **that are consistent with applicable designated uses and water quality standards**;

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1906.02 (f)**	Ross Povenmire and Allan Palmer – PSNH
20-Jul-01	**cwi**				

Comment: Information on affected water users should be fully understood before protected instream flows are proposed. The on-the-water survey of all resources should also include interviews and site walks with all significant AWUs to clearly document and confirm use patterns and volumes.

Response: No change. The Water Management Plans include interviews with all AWUs . See Env-Ws 1907.02(c).

(~~g~~**h**) For each segment and most sensitive instream public use or resource, determine and document a recommended **scientifically based** protected instream flow based on application of the method(s) identified in (f) above and applicable water quality standards; ~~and~~

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1906.02 (g)**	John McPhail – Gold Star Sod Farm & Nursery, Inc.
10-Jul-01	**cwi**				

Comment: Env- Ws 1906.02 (g) — Change to read: For each segment and most sensitive instream public use or resource, determine and document a scientifically based recommended protected instream flow...

Response: Changed Env-Ws 1906.02(~~g~~**h**).

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1906.02(f) (should be g)**	Ross Povenmire and Allan Palmer – PSNH
20-Jul-01	**cwi**				

Comment: The protected instream flows should reflect a balanced consideration of all the outstanding characteristics, uses, and resources of the designated liver identified in section 1906.02. The protected instream flow for a designated river is intended under the draft rule to protect "the most sensitive instream public use or resource" identified in 1906.02(c) and (d). The use of this phrase, coupled with specific reference to preceding sub-sections, strongly implies that the instream flow rate will be established with regard for only **one** use or resource, and without regard for potential impacts of protected flow levels on the outstanding characteristics listed in 1906.02(b), information provided by documents and reports catalogued and summarized in 1906.02(e), or other resources surveyed in 1906.02(f). In addition, it is unclear how the DES will select the "most sensitive" use or resource.

Response: No Change. During any time period, the most sensitive use or resource is the one that needs the highest flow. All other uses and resources should be satisfied by this amount of flow. Therefore, the selection of the most sensitive use or resource is based on which needs the highest flow. Each use or resource would be evaluated to determine which is most sensitive during the year.

(i) For each segment classified natural under RSA 483:7-a, assess the effect on recommended protected instream flows of inclusion as an Outstanding Resource Water under the provisions of RSA 483:9.IV; and

(~~h~~**j**) Assess the ~~affect~~ **effect** of the protected instream flow on existing hydroelectric power generation, water supply, flood control and other riparian users within the WMPA.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1906.02 (h)**	Jennifer J. Patterson – Conservation Law Foundation
13-Aug-01	**cwi**				

Comment: Change "affect" to "effect."

Response: Changed Env-Ws 1906.02(~~h~~**j**).

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1906.02(h) (should be i)**	Ross Povenmire and Allan Palmer – PSNH
20-Jul-01	**cwi**				

Comment: An assessment of the impacts of protected instream flow rates on "existing hydroelectric power generation, water supply, flood control and other riparian users within the WMPA" should be meaningfully incorporated into the procedure for establishing such instream flow rates. Such an incorporation is required by statute, with the obvious purpose of being included as a meaningful factor in setting protected instream flow rates. The draft rule requires an assessment, but does not require consideration of the assessment in any meaningful way.

Response: No Change. The assessment will be completed and made available for public review prior to the public hearing and opportunity for public comment defined in Env-Ws 1906.03. In general, our approach would be to establish protected instream flows considering only the protection of instream public uses, and then to evaluate the economic and social impacts. If the impacts were predicted to result in social and economic hardship, protected flows could then be re-evaluated

Env-Ws 1906.03 Publication, Hearing and Opportunity for Public Comment on Protected Instream Flows.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	1906.03	E. Geoffrey Verney – Monadnock Paper Mills, Inc.
13-Jul-01	**cwi**				

Comment: Monadnock is also satisfied that there are frequent opportunities for affected parties to comment on the Protected Instream Flow values and Water Management Plans, during Agency's development of these tools.

Response: Noted.

(a) After the Protected Instream Flow Study has been prepared, and prior to establishment of protected instream flows for a designated river or segment, the commissioner, in cooperation with the IFPAC, shall make the study available for public review and hold a public hearing to receive comment**s** as they pertain to protected instream flows on the following factors:

(1) All factors identified in RSA 483, including considerations identified in RSA 483:1, RSA 483:6, IV(a), and RSA 483:9-c;

(2) Water quality standards;

(~~2~~**3**) Flows established pursuant to existing federal licensing processes or state contracts;

(~~3~~**4**) Whether there are wastewater discharges that require a certain instream flow for permit compliance or maintaining water quality standards;

(~~4~~**5**) Whether the river contains flow-regulating structures such as dams, and if so, how such structures are used to manage flow;

(~~5~~**6**) Information relevant to flow conditions that will conserve, protect, maintain, or restore aquatic life or habitat, or both;

(~~6~~**7**) Information relevant to flow conditions that will conserve, protect, maintain, or restore recreational uses;

(~~7~~**8**) Information relevant to flow conditions that will conserve, protect, maintain, or restore resources for which the river is designated;

(~~8~~**9**) Stream gaging data ~~and watershed characteristics; and~~

(10) Watershed characteristics;

(~~9~~**11**) Pertinent resource management plans including fisheries management plans, watershed management plans, and recreation management plans; **and**

(~~10~~**12**) Other information relevant to the proposed protected instream flows.

(b) The hearing shall be held in a community through or past which the designated river flows.

(c) At least 30 days before the hearing, the commissioner shall issue a notice of the document availability and hearing in a newspaper of local circulation **and on the Department's website**~~,~~.

(d) At least 30 days before the hearing, the commissioner shall send written notice of the document availability and hearing to, and solicit comment from, the following:

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1906.03 (c)**	David L. Deen – Connecticut River Watershed Council
09-Jul-01	**cwi**				
Comment: NHDES should make a commitment here to publishing notice of any hearings on the DES Internet page. This concern is true for all of the situations throughout the rule where public hearings precede a decision by the commissioner. **Response:** Changed Env-Ws 1906.03(c).					

(1) Affected water users in the ~~watershed~~**WMPA**;

(2) ~~Dam owners in the watershed~~**Owners of dams with impoundments greater than 10 acres in the WMPA**;

(3) Federal energy regulatory commission, for each WMPA with a licensed or exempted hydropower site;

(4) LMAC members;

(5) LRMAC members for the designated river;

(6) The governing body of each municipality through or past which the designated river flows;

(7) National park service;

(8) New Hampshire department of justice;

(9) Public utilities commission;

(10) RMAC members;

(11) The governor of any state which shares a designated river;

(12) United States environmental protection agency;

(13) United States fish and wildlife service;

(14) United States forest service, for each designated river inside the white mountain national forest;

(15) United States geological survey; and

(16) Persons who have requested in writing to be notified of the hearing.

(~~d~~**e**) At the public hearing, the commissioner shall specify a comment period which shall close at least 30 days after the hearing date, during which time the commissioner will receive written comments on the factors pertaining to the proposed protected instream flows.

Env-Ws 1906.04 Establishment of Protected Instream Flows.

(a) Within 60 days of the close of the public comment period, the commissioner shall issue a decision establishing protected instream flows for the designated river.

(b) The commissioner's decision shall:

(1) Be in writing;

(2) State the **scientific** basis for the established flow(s), including an assessment of how the established flows will meet applicable water quality standards;

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	1906.04 (b) (2)	John McPhail – Gold Star Sod Farm & Nursery, Inc.
10-Jul-01	**cwi**				
Comment: Env- Ws 1906.04 (b) (2) — Change to read: State the scientific basis for the established flow(s), including how the established flows will meet water quality standards: **Response:** Changed Env-Ws 1904.04(b)(2).					

(3) Include the assessment required by RSA 483:9-c, III;

(4) Include a summary of comments received; and

(5) Include an explanation of how the comments affected the established flows.

(c) The commissioner shall send copies of the decision to:

(1) ~~All p~~**P**ersons identified in Env-Ws 1907.01(c); and

(2) Persons who submitted written comments on the proposed flows and who requested to receive a copy of the notice of the established flows.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1906.01 through**	Joint Comments by AMC, Ashuelot

14-Aug-01	**cwi**			**1906.04**	LAC, Audubon Society of NH, Coastal Conservation Association, Coldwater Fisheries Coalition, Connecticut River Joint Commissions, Connecticut River Watershed Council, Exeter River LAC, Merrimack River Watershed Council, Merrimack Valley Paddlers, NH Rivers Council, New Hampton Conservation Commission, Pemigewasset River Council, Piscataquog Watershed Association, Society for the Protection of NH Forests, Souhegan Watershed Association

Comment: *Consistency with Clean Water Act and Water Quality Standards – 1906.01 to 1906.04*

As drafted, these sections could result in establishment of protected flows that are inconsistent with the Clean Water Act and the state's Water Quality Standards. If, for example, the outstanding characteristics for which a river is designated and/or the "most sensitive instream public use or resource" (1906.02(f)) are inconsistent with the designated uses for that water body, it is quite possible that the protected instream flow will not be capable of maintaining the designated uses. As an example, the "most sensitive instream public use or resource" could be something other than aquatic life support despite that being the Clean Water Act designated use. Again, this could result in flow rules that fail to meet the requirements of the Clean Water Act.

The rules should result in the establishment of protected flows that are consistent with all water quality requirements, not just the requirements of RSA 483. To that end, we recommend adding a new paragraph to section 1906.02 that reads;

"For each segment, identify and catalog designated uses and applicable water quality standards"

In addition, paragraph (f) should be revised to read;

Identify and document method(s) for establishing a protected instream flow on segments for the most sensitive instream public use or resource identified in (c) and (d) above, that are consistent with applicable designated uses and water quality standards.

Since the U.S. EPA will ultimately have to approve or deny protected flows as water quality standards, these changes would increase the likelihood of approval.

Response: Changed Env-Ws 1906.02(c). added "(12) designated uses under the federal Clean Water Act", Changed Env-Ws 1906.02(~~f~~**g**) by adding "that are consistent with applicable designated uses and water quality standards"

Env-Ws 1906.05 Reconsideration of an Established Protected Instream Flow.

(a) A person may file a petition with the commissioner to request reconsideration of an established protected instream flow.

(b) If the petition is filed within 30 days of the date the decision is issued, the implementation of the decision will be stayed until the commissioner has acted on the petition, in accordance with RSA 483:9-c, VI.

(c) The petition shall be in writing.

(d) The petition shall include:

(1) The name, address and daytime telephone number of the person requesting reconsideration;

(2) If the person requesting reconsideration is not an individual, the name of an individual who can be contacted on behalf of the organization requesting the reconsideration;

(3) The specific change being sought in a protected instream flow;

(4) An explanation of how the flow that the commissioner established will adversely affect one or more of the resources for which a particular river or segment was designated by the general court under RSA 483, or will not meet water quality standards;

(5) The **applicability of the** factors identified in RSA 483:1, RSA 483:6, IV(a), and RSA 483:9-c **to the river for which establishment of a protected instream flow is being requested**;

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1906.05 (d) (5)**	Jennifer J. Patterson – Conservation Law Foundation
13-Aug-01	**cwi**				
Comment: Rewrite to read "The applicability of the factors identified in RSA 483:1, RSA 483:6, IV(a), and RSA 483:9-c to the river for which establishment of a protected instream flow is being requested." (Underlined portions are new). **Response:** Changed Env-Ws 1906.05(d)(5).					

(6) If applicable, the specific error(s) committed by the commissioner in evaluating the factors identified pursuant to (4) and (5) above; ~~and~~

(7) Data not available or not considered at the time the protected instream flow was set~~.~~**; and**

(8) Other reasons for requesting reconsideration.

(e) Within 30 days of receiving a petition for reconsideration, the commissioner shall:

(1) Deny the request and affirm the established protected instream flow; or

(2) Grant the request and reconsider the protected instream flow.

(f) If the commissioner believes that an oral hearing would facilitate making a decision to deny or grant the request, the commissioner shall:

(1) Schedule a hearing; and

(2) Notify the person **who made the request, any other person who has requested to be notified, and the general public** of the date, time and place of the hearing.

(g) Any hearing so scheduled shall be conducted in accordance with ~~RSA 541-A and~~ Env-C 20~~0~~**5 relative to non-adjudicative public hearings**.

(h) The commissioner shall grant the request if the information in the request or other information reviewed by the commissioner indicates that the established instream flows are not correct.

(~~h~~**i**) ~~If the commissioner denies the request,~~ **The commissioner's decision shall**:

(1) ~~Notify the person~~ **Be in writing** ~~of the denial~~; ~~and~~

(2) Be sent to the person who requested the instream flow to be established and to any other person who has asked to be notified of the decision in writing;

(3) Be made available electronically to the general public; and

(~~2~~**4**) State the reason(s) for the ~~denial~~ **decision, whether the decision is to deny the request or to reconsider established protected instream flows**.

(~~i~~**j**) If the commissioner grants the request, the commissioner shall~~:~~

~~(1) Notify the person in writing that protected instream flows will be established; and~~

~~2)~~ ~~I~~initiate the process for establishment of protected instream flows**, within 30 days of the decision, by the process in Env-Ws 1906.**

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1906.05 (i)**	Jennifer J. Patterson – Conservation Law Foundation
13-Aug-01	**cwi**				

Comment: should include a timeframe for the commissioner's action on reconsideration.
Response: Changed Env-Ws 1906.05(i)

(j) As specified in RSA 483:9-c, VI, the commissioner's decision on the request may be appealed in accordance with RSA 541.

(k) The commissioner shall initiate action to reconsider a protected instream flow by the process described in Env-Ws 1906.03 and 1906.04 if there are changed conditions in the watershed that warrant re-evaluation of the flows.

Env-Ws 1906.06 Protected Instream Flows and Water Quality Criteria. Protected instream flows established by the commissioner shall serve as water quality criteria for the purpose of administration of water quality standards by the department under the federal Clean Water Act.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1906.06**	Vernon Lang – US Fish and Wildlife Service
19-Jul-01	**cwi**				

Comment: At the risk of being redundant, this subsection should clearly state that both the general standards under section 1904 and study based flow standards under section 1906 are protected instream flow under 483:9-c and both serve as water quality criteria as stated in the draft rule.

Response: No Change. Only established protected instream flows serve as water quality criteria. The General Standard does not.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1906.06**	Carl Deloi – EPA
20-Jul-01	**cwi**				

Comment: Section 1906.06 states that established protected instream flows will serve as water quality criteria for the purpose of the administration of water quality standards by the DES under the federal Clean Water Act. This infers that the protected instream flows will be adopted by DES as state water quality standards. EPA in its role to work with the states in the development, review and approval of water quality standards looks forward to working with DES throughout this process. As such, EPA would like to be involved as much as possible in the process leading up to the establishment of protected instream flows for designated rivers. We note that the draft rule states that EPA will be afforded an opportunity to comment on protected instream flow studies. EPA anticipates that its early involvement will facilitate the approval process with respect to instream flow water quality criteria.

Response: Noted. We look forward to working with EPA on developing an efficient process for incorporation of established protected instream flows into the water quality standards.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1906.06 and 1904.01**	Carl Deloi – EPA
20-Jul-01	**cwi**				

Comment: EPA seeks clarification from DES as to whether it plans to adopt the provisions of the General Standard (Part 1904.1) as criteria in the state water quality standards.

Response: No, DES will not adopt the General Standard as part of the state water quality standard.

Part Env-Ws 1907 PROCEDURE FOR ADOPTION OF WATER MANAGEMENT PLANS

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**Part 1907**	Vernon Lang – US Fish and Wildlife Service
19-Jul-01	**cwi**				

Comment: Water Management Plans are intended to document the means by which protected instream flows will be met in rivers/segments that do not meet the general standards. These plans consist of three elements, a conservation plan, a water use plan and a dam management plan. Setting aside water conservation, the apparent basic thrust or central element of the water management plan and draft rule is to solve instream flow needs by using flow augmentation from existing instream impoundments and perhaps new instream impoundments in each basin. This would have the effect of removing the responsibility from individual water withdrawers to solve instream flow problems created by their actions and shifting the responsibility to other waterbodies controlled by the state (public) and other entities.

Response: No Change. Under common law, the collective action of riparian owners with respect to water use must preserve the public trust uses of waterbodies. The responsibility is a collective one as well as an individual one. The Water Management Plan provides a framework for this.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**Part 1907**	Carl Deloi – EPA
20-Jul-01	**cwi**				

Comment: The terms "affected water user" and "aggregate water use" are used throughout the rule both in a regulatory and planning context. As defined, these terms are not inclusive of all water users or all water use in a drainage. EPA believes that for purposes of preparing a water management plan (Part 1907) all known water users and use in the drainage area need to be considered to ensure that implementation of the water management plan will achieve its goal.
There are provisions for both a water use plan and a dam management plan. It seems that dams would be one of the water uses that would be considered in a water use plan. It is not clear how a water use plan and a dam management plan would be coordinated and if one plan will carry greater weight than the other.

Response:
1) No Change. Dams alone are not water users. Water use plans and dam management plans are implemented together and are equally enforceable. The difference between the two plans is that water use plans place constraints on water use by an affected water user whereas dam management plans place constraints on dam operation and water releases by dam owners.
2) No Change - further discussion encouraged. We would consider expanding the definition of affected water user to include all registered water users in the upstream drainage area. Further discussion is needed.

Env-Ws 1907.01 Elements.

(a) The water management plan shall ~~document~~ **set forth** the means by which the protected instream flows established under Part Env-Ws 1906 for a designated river or segment will be met.

(b) To adopt a water management plan the commissioner shall:

(~~a~~**1**) Prepare a water management plan, which includes:

~~(1)~~**a.** A conservation plan, as provided in Env-Ws 1907.02;

~~(2)~~**b.** A water use plan, as provided in Env-Ws 1907.03; and

~~(3)~~**c.** A dam management plan, as provided in Env-Ws 1907.04;

(~~b~~**2**) Make the water management plan available for public review;

(~~c~~**3**) Hold a public hearing and receive comments as provided in Env-Ws 1907.05; and

(~~d~~**4**) Issue a decision adopting a water management plan for the WMPA of the designated river, as provided in Env-Ws 1907.06.

Env-Ws 1907.02 Conservation Plan. To prepare the conservation plan the commissioner shall:

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	1907.02	E. Geoffrey Verney – Monadnock Paper Mills, Inc

13-Jul-01	**cwi**				Paper Mills, Inc.

Comment: As a longstanding supporter of water conservation practices however, we are concerned that the protracted process for setting up a river's Water Management Plan will slow the practice of overall water conservation and recycling of internal wastewater streams. A company will not want to invest significant capital in water conservation equipment unless a reasonably short-term payback can be achieved.

Our company has already invested in water conservation programs to achieve a sizable reduction in water consumption. Since 1996 we have reduced total water usage by 15 %. This translates to about 130,000 gallons per day or 47 million gallons per year. We cannot do much more without significant capital investment. We believe that Water Management Plans must give credit for prior and ongoing efforts to reduce water consumption. Otherwise, the more wasteful consumers are greatly advantaged at the onset of the Plan. The risk to reducing the facility's baseline water consumption prematurely cannot be overlooked if it will be required to reduce from that new baseline again in only a few years. Unfortunately, that itself is enough to discourage near term conservation.

Response: No Change at this time - further discussion encouraged. We recognize the value of giving credit for prior water conservation efforts. We are open to suggestion. Env-Ws 1907.02(3) includes a description of past conservation practices, which is intended to facilitate comparison of past conservation practices among affected water users.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	1907.02 1907.08	Jennifer Patterson - Conservation Law Foundation
28-Aug-01	**pmc**	**28-Aug-01**	**pmc**		

Comment: A second general comment concerns Part 1907. CLF applauds the thoroughness of the rules with respect to the information the Department will gather and consider in adopting water management plans. However, CLF is concerned that without cooperation or participation by the water users and dam owners, gathering this information may be difficult and burdensome for the Department. In order to ensure that the rules establish effective incentives for active participation by water users, Env-Ws 1907.02 should be amended to state that when the Department begins preparing the conservation plan, the Department will notify all affected water users that the conservation plan is being produced, that the plan will be used to produce an enforceable water management plan, and that the water user is strongly encouraged to participate in the process by providing information that will help the Department understand that user's water use. In conjunction with this change, the following sentence should be added between Env-Ws 1907.08(e) and (f) : "Absent a showing of good cause, the commissioner will not grant a request for reconsideration which is based on "new" information that was available to the party requesting reconsideration at the time of the department's investigation, but was not submitted to the department in a timely fashion."

Response: Added Env-Ws 1907.02(b), Env-Ws 1907.04(a), Env-Ws 1907.08(e)

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	1907.02	Sharon Francis – Connecticut River Joint Commissions, Inc.
27-Jul-01	**cwi**				

Comment: We particularly welcome [. . .] the specific inclusion of water conservation plans on the part of water users.

Response: Noted.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907.02**	Ross Povenmire and Allan Palmer – PSNH
20-Jul-01	**cwi**				

Comment: The State's interest in promoting general water conservation can be achieved without the extraordinary requirements included in the rule for the Conservation Plan. Under the draft rules, restrictions on water use necessary to maintain protected instream flows will be an integral part of a water use plan. A separate Conservation Plan in the draft rules could potentially require mandatory reductions in water use **beyond** those necessary to maintain instream flows. Once the protected flows are secured, however, the public interest in further restricting water use should be subordinated to the rights of riparian owners to make reasonable use of the resource, and should provide significant discretion and flexibility to individual water users in achieving further reductions in water use. The Conservation Plan preparation requirements in the draft rule should be reduced considerably to reflect this greater discretion and flexibility.

Response: Changed Env-Ws 1907.07(a)(3) to include conservation plans so that the criteria for adoption is that the effect of implementation of all three plans is the maintenance of protected instream flows.

(a) Identify all affected water users in the WMPA.

(b) Notify each affected water user in the WMPA that a Water Management Plan is being prepared, that the plan will be enforceable, and that the water user is strongly encouraged to participate in the process by providing information that will help the Department understand that user's water use.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907.02 (a)**	Vernon Lang – US Fish and Wildlife Service
19-Jul-01	**cwi**				

Comment: As recommended in subsection 1902.02 and elsewhere, dam and impoundment owners should be included in the definition of affected water users and be subject to water conservation plans.

Response: No Change. Dams are not water users required to be registered under Env-Wr 700.

(~~b~~**c**) Determine water user types within the WMPA, and conduct a literature search of conservation measures and best management practices applicable to each type of water user;

(~~c~~**d**) For each affected water user in the WMPA, write a report of water use patterns, needs, and the potential for conservation by collecting specific water-use data and information from department records, site visits, and interviews, which shall include the following information:

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907.02 (c)**	Vernon Lang – US Fish and Wildlife Service
19-Jul-01	**cwi**				

Comment: I suggest amending this subsection to include a line item that would require a time series analysis of how much water could be saved from evaporation and enhanced evapotranspiration losses and ground and surface water interception which is captured in impoundment storage by simulating the removal of the dam or control structure and thereby restoring the waterbody to its natural condition.

Response: No Change. We have no information to indicate that dams in themselves are a generally significant factor in changing evapotranspiration, interception, or evaporation. If warranted, these factors could be included in either the protected instream flow study or the dam management plan for a particular river.

(1) A complete description of all water use at the facility including:

a. Water source(s) and destination(s);

b. Anticipated demand for water that describes maximum, minimum, and average water withdrawal rates, schedules and durations;

c. Factors that control water demand such as consumer choice, delivery contracts, availability, crop needs, manufacturing runs, seasonal occupancy, and precipitation;

d. Projected growth or decline in the demand for water and a description of the factors that control the growth or decline in demand for water; and

e. A description of how the water is utilized including a description and a percent estimate of the total volume of water used for each applicable process or need.

(2) An evaluation of all water conservation opportunities employed at the facility including:

a. Assessment of changes to historic water demand records;

b. Leak detection and repair activities;

c. Water audits and preventative maintenance programs;

d. Employee education pertaining to water conservation practices; and

e. Other water conservation opportunities.

(3) A detailed description of past and present water conservation efforts, their effectiveness and cost;

(4) A description of water conservation best management practices ~~or~~ **and** best available technologies applicable to the types of water-using processes at the facility;

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907.02 (c) (4)**	Vernon Lang – US Fish and Wildlife Service
19-Jul-01	**cwi**				
Comment: I suggest that this element be broken into two parts to keep best management practices separate from best technology available because the two terms have different meanings. The term best technology available has certain regulatory implications under the Clean Water Act and would be a much more meaningful inquiry for the Department to make than simply addressing BMP's. Where as here, the Department has a choice to make, I recommend using the best technology available inquiry. **Response:** Changed "or" to "and" in Env-Ws 1907.02(c)(4).					

(5) A detailed summary of water conservation measures that are planned for implementation during the next 5 years including a quantitative estimate of the water savings associated with these measures;

(6) An economic analysis and calculation of a payback period that factors the true cost of water for implementing the water conservation best management practices or best available technologies listed in Env-Ws 1907.02(b) above, but that are not implemented at the facility; and

(7) A detailed summary of any efforts to implement or develop new processes or technologies that may result in additional water conservation opportunities.

(~~d~~**e**) Develop a conservation implementation plan and quantitative water use reduction targets by negotiating implementation of conservation measures with each affected water user, which includes:

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907.02 (d)**	Jasen Stock – NH Timberland Owners Assoc.
19-Jul-01	**cwi**				

Comment: Conservation Plan Negotiations – Section 1907.02(c)(7)(d) requires water users to negotiate with the Department to establish the conditions of their water conservation plan. Although the NHTOA appreciates the willingness of the Department to engage in such a negotiation we believe the establishment of an incentive program to accomplish water conservation is more effective. Such an incentive program could be based on "water use credits" or monetary reimbursement. Under such a system only those water users who make the capital or operational investments to conserve water are rewarded.

Response: No Change at this time - further discussion encouraged. We recognize the value of incentives for water conservation efforts. We are open to suggestion. We agree that rewarding investments to conserve water is desirable.

(1) A description of water conservation measures to be implemented;

(2) A schedule for the implementation of water conservation measures; and

(3) A description of a process to monitor and evaluate the results of, and compliance with, the water conservation plan.

Env-Ws 1907.03 Water Use Plan. To develop the water use plan the commissioner shall:

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907.03**	Vernon Lang – US Fish and Wildlife Service
19-Jul-01	**cwi**				

Comment: With the exception of the discussion on water sharing between users, all of the substantive elements of the water use plan appear to be covered under sections 1907.02 and 1907.04, the water conservation and dam management plans, respectively. If this is substantially correct, I would recommend adding a line item under 1907.02(c) to address the water sharing issue and delete proposed subsection 1907.03 since it is essentially made redundant with the water conservation and dam management plans.

Response: No change. We view conservation under Env-Ws 1907.02 as separate from shared water use and management under Env-Ws 1907.03 and Env-Ws 1907.04.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907.03**	Tom Chasse – Attitash Bear Peak
25-Jul-01	**cwi**				

Comment: Headwater users can be penalized by heavy use lower in the watershed, even though their uses are in compliance with the general standard;

Response: No Change. Maintenance of protected instream flows to protect instream public uses is a shared responsibility among all riparian owners and water users in the upstream watershed. The purpose of a negotiated Water Management Plan is to obtain reasonable use for all.

(a) Use the water use data and information collected ~~pursuant~~ **under** ~~to~~ Env-Ws 1907.02(c) to define water use patterns and needs of each affected water user within the WMPA;

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	1907.03	Jasen Stock – NH Timberland Owners Assoc.
19-Jul-01	**cwi**				

Comment: Rule Implementation - Water Returns – Although the Department considers the "aggregate water use" to calculate the De Minimis flow and General Standard the water use plan fails to recognize nor credit specific water users for their water returns. The NHTOA urges the Department to incorporate a water return credit mechanism whereby affected water users' water returns can be used to offset the amount of water they are allowed to withdraw. Such a mechanism will provide an incentive to water users to decrease consumption by increasing their water returns. This credit system needs to consider all water returns, including those discussed above in the definition of "Aggregate water user".

Response: No Change - further discussion encouraged. Registered water returns (>20,000 gallons per day) are accounted for in water use assessments. Water returns are credited to the river. We will work with sawmill owners to find ways to measure return flows from log watering use. In practice, this would be documented in the Water Management Plan.

(b) For each affected water user, write a report describing the potential for water use modification or sharing or both to meet **protected** instream flow requirements, including consideration of water use patterns and needs as determined in (a) above;

(c) For each existing hydroelectric power facility within or upstream from the designated river or segment, request the assistance of the public utilities commission in order to assess the effect of a protected instream flow upon such facility.

(c) Meet with each affected water user and discuss protected instream flow requirements;

(d) Mediate and guide negotiations among dam owners and affected water users towards water use and dam management that will meet protected instream flow requirements; and

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907.03 (d)**	E. Geoffrey Verney – Monadnock Paper Mills, Inc.
13-Jul-01	**cwi**				

Comment: Monadnock owns several water withdrawal and discharge points, located upstream and downstream of other water users on the Contoocook River, and a FERC licensed hydropower project consisting of *5* wheels at 4 dams. The financial and operational impact of an unwritten Water Management Plan cannot be determined and we cannot subscribe to these rules without knowing the cost to our operations.

Response: No Change - further discussion encouraged. The rules describe the process for developing a Water Management Plan. Each water user will have great opportunity to participate in development of the plan for their watershed, including interviews with the department and negotiations with other water users, and will have appeal recourse if the result is unsatisfactory to the user.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907.03 (d)**	Maura Carroll – New Hampshire Municipal Association
27-Jul-01	**cwi**				

Comment: [. . .]there will be practical difficulty in meeting with and "negotiating" with dam owners and water users to meet protected instream flow requirements [. . .]

Response: No change - further discussion encouraged. We welcome suggestions for changes in rule wording to facilitate the negotiation process.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907.03 (d)**	Wayne A. Mann – NH Farm Bureau Federation
19-Jul-01	**cwi**				

Comment: As expressed in past letters and conversations, Farm Bureau has serious concerns about the fairness of negotiated water use during periods of low flow. Farm Bureau is concerned that farmers will face challenges from other water users with access to significant legal and technical expertise, placing agricultural users at a significant disadvantage. DES should assure that any negotiated water use process treats all parties equally.

Response: No change - further discussion encouraged. We welcome suggestions for changes in rule wording to facilitate the negotiation process. We anticipate that DES or its contractor would work with each water user to achieve fair and equitable negotiations. The public participation and appeals process is also available, and as a last recourse the courts.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907.03 (d)**	Michael S. Giaimo - Business and Industry Association
19-Jul-01	**cwi**				

Comment: § 6 FORCED SHARING AND NEGOTIATION AMONG WATER USERS WILL PRODUCE CONFLICTS AND ANIMOSITY

The rules in their current form stress the importance of cooperation among users so as to coordinate consumption below the de minimus threshold. This rule presupposes that cooperation can be achieved. What occurs if consensus or a negotiated agreement can't be achieved? Does this mean that the court must be the forum for resolution, or is there an alternate dispute resolution approach available, such as an arbitrator, mediator, or facilitator?

Regretfully, the BIA does not share the same unbridled optimism and faith that DES does in believing that users will able to reach a solution regarding water consumption. Throughout time, people have fought (and have often gone to war) over water, and there is no reason to believe that this trend will stop, especially given the fact that numerous individuals will be fighting over the small and precious amount of water afforded under the 5% of 7Q10 standard.

Though the BIA appreciates DES's attempt to allow water users to settle water needs and disputes amicably, the BIA is concerned that these water use negotiations will be hostile and will produce conflicts and animosity among users, all of whom will have a justifiable and compelling need for the water.

Response: No change - further discussion encouraged. At present we have only the courts to decide water management issues. The courts will remain as a final decision maker should negotiations fail under the Instream Flow Rules. We anticipate that DES or its contractor would work with each water user to achieve fair and equitable negotiations. There are also provisions for public participation, the IFPAC, and a reconsideration process in the rules. In addition, both protected instream flows and water management plans may be appealed to the Water Council, and then to Superior Court. The rules offer multiple administrative mechanisms for dispute resolution. We view this as better than reliance on litigation alone.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907.03 (d) and 1907.04 (d)**	Jasen Stock – NH Timberland Owners Assoc.
19-Jul-01	**cwi**				

Comment: Water Use and Dam Management Negotiations – In both the Water Use Plan in Section 1907.03(d) and the Dam Management Plan in Section 1907.04(d) the Department proposes to organize and mediate a water use negotiation amongst affected water users and dam owners on those rivers with protected instream flows. The NHTOA believes this is a serious flaw in the proposed rules that will result in pitting New Hampshire's businesses against one another in an effort to secure water use rights. Other problems with such a water use determination process include,

- How does it consider new businesses seeking to locate in the designated river's watershed?
- How does it consider existing businesses seeking to expand their existing operations?
- How far upstream into the watershed does the negotiation include (e.g. If the lower Pemigewasset fails to meet the general standard would all businesses on the Pemigewasset, Baker and Beebe Rivers have to be included in the negotiation?)

Finally the NHTOA believes such a water use determination process will lead to increased operating costs through increased legal fees as such agreements will require legal review and enforcement.

Response: 1) Changed Env-Ws 1907.08(a) to clarify that the reconsideration process may be used when there is new or increased water user proposed.

2) Negotiations include all affected water users in the Water Management Plan Area, which is the "tributary drainage area" to the designated river or segment. This is the entire upstream drainage area.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907.03 (d)**	Jason R. Mulcahy – Golf Course Superintendents Association
14-Aug-01	**cwi**				

Comment: The proposed rules state that when Water Management Plans (WMP) go into effect on designated sites, the Commissioner will conduct negotiations between users to determine how the available water will be divided among them. Negotiations are going to take time out of water users' busy schedules and will be difficult to manage by the NHDES. How is the Commissioner going to decide which user has priority over another for water rights? Will political or financial strength play a role as to who is granted more water? Once user amounts are determined, how is the state going to enforce the quantities used? These are all questions which need to be addressed before these rules go to the state Senate.

Response: No change - further discussion encouraged 1) All users have equal rights to "reasonable use" under common law, and all would have equal priority in negotiations. We think that economics are a major consideration in reasonable use, and are looking for ways to better incorporate economics into preparation of the Water Management Plan.

2) Enforcement would be after the fact, done by DES in an audit of water use records for a particular facility, compared to water use requirements of the adopted Water Management Plan in relation to gage records of streamflow. Once the rules are in place, staffing for the program would determine how many audits are done.

(e) For each affected water user prepare an individual water use plan so that the net effect of implementation of all individual plans, in coordination with implementation of the dam management plan, is maintenance of the protected instream flows.

(f) For each affected water user prepare an implementation schedule for the individual water use plan.

(g) Prepare an economic assessment of the cost to implement the plan. The economic assessment shall:

(1) Include an estimate of implementation costs for each affected water user;

(2) Consider the implementation schedules in (f) above; and

(3) Include any other identified economic factors not attributable to affected water users.

Env-Ws 1907.04 Dam Management Plan. To develop the dam management plan the commissioner shall:

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907.04**	Eric P. Orff – NH Resident
16-Jul-01	**cwi**				

Comment: During the past three decades I have also witnessed mismanagement of the same rivers during low flow periods when the fish and wildlife were subjected to nearly empty rivers. The latest was just this last May when the Suncook River In Epsom was lowered over three feet when the dam boards were put in at Suncook Lake and NOT at the Pembroke dam. Subsequently all the back waters and eddies were DE-watered in a short period. This occurred just days after the frogs and fish had spawned in the coves virtually destroying this years breeding efforts. Unfortunately this has been an annual occurrence the last 5 or 6 years. It's a crime there is such poor management of our rivers. The meadow below my house has seen a dramatic decline in the number of frogs calling the last several years.

Response: Noted. For designated rivers, adoption of a Water Management Plan that includes requirements for dam operation would avoid such occurrences.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907.04**	Richard A. Norman – Granite State Hydropower Assoc.
27-Jul-01	**cwi**				

Comment: Another concern of GSHA is the status Dam Owners are given under the proposed rules. The potential exists for dam owners to be requested or required to operate their impoundments so as to augment flow during times of low flow under a Water Management Plan. Most GSHA member's' projects have run-of-river operating conditions set by FERC. Varying flow to augment river flow during low flow conditions would be a direct violation of these conditions. Further, projects could be substantially impacted from the resulting labor intensive operation required to carry out flow augmentation.

Response: No change - further discussion encouraged. We think that there may be mutual advantage to considering other than run-of-river operating conditions during low flow periods. Any such operational changes would be negotiated, not forced, and would be made with FERC involvement. We recognize that the details remain to be worked out. This would be done for each dam during preparation of the Water Management Plan.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907.04**	Joint Comments by AMC, Ashuelot LAC, Audubon Society of NH, Coastal Conservation Association, Coldwater Fisheries Coalition, Connecticut River Joint Commissions, Connecticut River Watershed Council, Exeter River LAC, Merrimack River Watershed Council, Merrimack Valley Paddlers, NH Rivers Council, New Hampton Conservation Commission, Pemigewasset River Council, Piscataquog Watershed Association, Society for the Protection of NH Forests, Souhegan Watershed Association
14-Aug-01	**cwi**				

Comment: While we don't oppose the idea of using impoundments to augment flows to minimize the impact of the rules on users, dam management should not become a means for the regulated community to avoid changes in their operations or water conservation/efficiency. Neither should it result in greatly reduced natural flow variability, on which river ecosystems are dependent for aquatic ecosystem structure and function.

Response: Noted. Flow variability requirements would be captured in the established protected instream flows. Flow augmentation aspects as well as water conservation would be addressed in preparation of the Water Management Plan. Public and IFPAC review will help insure conservation is not overlooked in favor of flow augmentation.

(a) Notify each dam owner in the WMPA that a Water Management Plan is being prepared, that the plan will be enforceable, and that the dam owner is strongly encouraged to participate in the process by providing information that will help the Department understand operational parameters and needs for the dam.

(~~a~~**b**) Collect data and information from DES sources, site visits and interviews with each dam operator on characteristics and operational procedures of all dams with impoundments greater than 10 acres within the WMPA and the associated dam's characteristics and operation plan including:

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907.04 (a)**	Vernon Lang – US Fish and Wildlife Service
19-Jul-01	**cwi**				

Comment: As discussed under section 1902.02, I recommend that an affected water user include any entity using or causing the loss of 20,000 GPD on any day from either surface or ground water. This modification is intended to expand the reach or applicability of the rule to all users at or above the 20,000 GPD threshold whether registered or not and also makes the rule much more equitable. The 20,000 GPD threshold for any day should apply to impoundments of one acre or greater in size including lakes and ponds with dams or control structures where the man-made surface or flowage area exceeds one acre. As an example, a 2 ½ acre impoundment will evaporate 20,000 GPD into the atmosphere during hot, dry summer conditions based on a daily evaporation rate of 0.3 inches. A one (1) acre threshold is reasonable because impoundments smaller than an acre in size can easily intercept in excess of 20,000 GPD in one day and retain that volume in storage for long periods. e.g., weeks. Accordingly, I recommend that the proposed ten (10) acre threshold be changed to one (1) acre.

Response: 1) No Change. We have no information to indicate that dams in themselves are a generally significant factor in changing evapotranspiration, interception, or evaporation. If warranted, these factors could be included in either the protected instream flow study or the dam management plan for a particular river.
2) No Change from 10-acre to 1-acre threshold for regulated dams. Our analysis shows that impounded volume for waterbodies under ten acres is insignificant in all designated river watersheds.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907.04**	Vernon Lang – US Fish and Wildlife Service
19-Jul-01	**cwi**				

Comment: I would suggest adding the following line items to the present list of information on dam and impoundment characteristics:

(29) Design and operational capabilities of the dam or control structure to measure and pass outflows on an instantaneous basis equal to the measured inflows from ground and surface sources during various flow conditions.

(30) Data on evaporation and enhanced evapotranspiration losses, and annual ground water and surface water interception by the impoundment, pond or lake due to the existence of these facilities and by water level management activities.

Response: (29) No Change. Inflow is rarely, if ever, measured.

(30) No Change. These data are not generally available, and further we have no information to indicate that dams in themselves are a generally significant factor in changing evapotranspiration, interception, or evaporation. If warranted, these factors could be included in either the protected instream flow study or the dam management plan for a particular river.

(1) Name of the dam;

(2) Town of dam location;

(3) Name, address and telephone number of owner or operator or both;

(4) Emergency contact person and phone number;

(5) Dam State ID number;

(6) Dam status (active or inactive);

(7) Names of the water body impounded by dam and the downstream river;

(8) Designated use(s) of the impoundment;

(9) Elevation of recreational pool or height relative to the lowest spillway (in feet);

(10) Elevation of additional spillway crest(s) or height relative to the lowest spillway (in feet);

(11) Elevation of streambed at centerline of dam or height relative to the lowest spillway (in feet);

(12) Elevation of top of dam or height relative to the lowest spillway (in feet);

(13) Height of dam (in feet from toe to highest point on the dam);

(14) Freeboard (in feet);

(15) Type and dimensions of spillway control(s) or outlet works;

(16) Surface area of impoundment at maximum impoundment (in acres);

(17) Drainage area (in square miles);

(18) Maximum impoundment storage (in acre-feet);

(19) Permanent impoundment storage (in acre-feet);

(20) Estimated net effective storage (in acre-feet);

(21) Maximum unoperated discharge (in cfs);

(22) Design storm discharge, (in cfs);

(23) Estimated 50-year flood flow, (in cfs);

(24) Estimated 100-year flood flow, (in cfs);

(25) Contractual obligations, minimum flow requirements and flowage rights, if any; and

(26) Operation and maintenance plan summary;

(27) Interests of riparian property owners to the impoundment**; and**

(28) Water quality standards factors related to the impoundment;

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907.04 (a) (28)**	Joint Comments by AMC, Ashuelot LAC, Audubon Society of NH, Coastal Conservation Association, Coldwater Fisheries Coalition, Connecticut River Joint Commissions, Connecticut River Watershed Council, Exeter River LAC, Merrimack River Watershed Council, Merrimack Valley Paddlers, NH Rivers Council, New Hampton Conservation Commission, Pemigewasset River Council, Piscataquog Watershed Association, Society for the Protection of NH Forests, Souhegan Watershed Association
14-Aug-01	**cwi**				

Comment: Paragraph (28) of Section 1907.04(a) should be revised to read: "Impoundment and downstream water quality standards, wetlands, littoral, fishery, wildlife, recreational and other factors that cannot necessarily be subordinated to meet instream flow augmentation needs."

Response: No Change. We believe that the existing wording of (28) includes these aspects adequately.

(~~b~~**c**) For each dam, write a report describing the potential water available for release to maintain protected instream flows, **the ecological and other impacts to the impoundment and downstream river reaches which may restrict the use of such waters for augmentation flows**, and the potential for dam management to meet instream flow requirements, including dam operation patterns, physical structure, and needs as determined in (a) above;

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907**	Vernon Lang – US Fish and Wildlife Service
19-Jul-01	**cwi**				

Comment: I suggest inserting a new subsection in front of existing (b) to require an analysis of water losses due to evaporation and enhanced evapotranspiration from the impoundment, lake or pond. The subsection should require an analysis of the ability of the dam/impoundment to compensate on an instantaneous or daily basis for evaporation and enhanced evapotranspiration losses. The subsection should also require an analysis of ground water flow captured by the impoundment and how this flow would be compensated for in the dam operational plan to insure that all inflow is accounted for and released as outflow to the stream. In addition for lakes and ponds, an analysis of the natural unregulated hydrograph would be useful to determine the relationship between lake level and streamflow (outflow). This analysis would be useful in determining the effect of lake level regulation on streamflow particularly during the summer season when many lakes and ponds are regulated to keep a full pool for recreation purposes.

Response: No Change. We would be interested in cooperating with a pilot study with US Fish & Wildlife Service to further explore the implications of evaporative and interception changes due to impoundments. We do not think the science is there to put these aspects explicitly into the rules.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907**	Vernon Lang – US Fish and Wildlife Service
19-Jul-01	**cwi**				

Comment: This subsection is problematic because it promotes flow augmentation from instream sources as the solution to water demands when streamflow is at or below protected instream flow levels rather than requiring the water user to address their water use problem at the point of withdrawal or loss. The draft rule would set an unfortunate precedent by shifting the responsibility of water users to manage their withdrawals or evaporative losses (water use) to protect instream public uses to a different entity unrelated to the withdrawals or evaporative losses. By developing and promulgating a rule that could provide affected water users the ability to escape responsibility for individual and collective actions via flow augmentation, the incentive for wise water use, water conservation and protection of instream public uses and values will have been compromised or eliminated.

Additionally, the emphasis on augmentation from instream impoundments is troubling because, in most cases, no physical or operational relationship exists between the impoundments in the basin and water withdrawals. These facilities are not ordinarily in close proximity to one another. Geologic, weather and other environmental conditions between the impoundments and withdrawal points may differ markedly. Under certain geologic and hydrologic conditions, water released from upstream locations may recharge groundwater and not reach the downstream withdrawal point.

The draft rule makes a number of assumptions that should have been analyzed more fully before moving forward to the public review process. The major assumption is that available water either already exists or could be made available to augment streamflow to maintain a protected instream flow threshold, or to offset water use by water users when streamflow drops below protected levels. The protected instream flow levels are an unknown with the exception of the general standards. Therefore, the Department and other parties have no way to determine how much water would be needed under the flow augmentation scenario. Without this information, it is not possible for the Department to demonstrate on a theoretical basis that flow augmentation is practicable. In addition, without an estimate of the augmentation volumes required and a preliminary list of impoundments targeted as augmentation sources, it is not possible to obtain a glimpse of the environmental effects of the proposal and therefore, the environmental acceptability of the augmentation proposal remains largely unknown.

From a National perspective, the proposal to use flow augmentation from instream sources is almost certain to be contrary to the objectives in the Clean Water Act to restore the chemical, physical and biological integrity of the Nations waters. Impoundments are a major causal factor for streams and rivers failing to meet integrity standards based on aquatic life, temperature, dissolved oxygen, habitat and other factors. The draft rule would likely create incentives to maintain unnecessary impoundments, perhaps create new ones and increase storage and water level fluctuations in certain other existing impoundments. The Service believes that the Department should be moving in the opposite direction, seeking opportunities to remove dams and impoundments and restoring streams, rivers and other waterbodies to their natural condition in so far as possible.

Response: No Change. These issues would be addressed river by river in the establishment of protected instream flows and adoption of a water management plan. The intent of the rules is to create a framework for site-specific consideration and analysis of all the factors involved in water management. We note that flow augmentation is a successful long-standing practice on a number of New England river systems. Further, attainment of a "natural" flow condition is not the goal of instream flow protection under RSA 483. The goal is protection of instream public uses. These would be fully identified and their flow requirements would be quantified in the establishment of protected instream flows.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907.04 (b)**	Joint Comments by AMC, Ashuelot LAC, Audubon Society of NH, Coastal Conservation Association, Coldwater Fisheries Coalition, Connecticut River Joint Commissions, Connecticut River Watershed Council, Exeter River LAC, Merrimack River Watershed Council, Merrimack Valley Paddlers, NH Rivers Council, New Hampton Conservation Commission, Pemigewasset River Council, Piscataquog Watershed Association, Society for the Protection of NH Forests, Souhegan Watershed Association
14-Aug-01	**cwi**				

Comment: Section 1907.04(b) should clearly delineate the conditions under which dam management applies. This section should be revised to read: "For each dam, write a report describing the potential water available for release to maintain protected instream flows, the ecological and other impacts to the impoundment and downstream river reaches which may restrict the use of such waters for augmentation flows, and the…"

Response: Changed Env-Ws 1907.04(b)

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907 (b)**	Tom Chasse – Attitash Bear Peak
25-Jul-01	**cwi**				

Comment: Water level management on lakes and ponds for the benefit of downstream users will open a can of worms so big that it will quickly overshadow the minimum flow issue involved.

Response: Noted.

(~~c~~**d**) Meet with dam owners **and lakefront interests** to explain protected instream flow requirements;

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907.04 (c)**	Joint Comments by AMC, Ashuelot LAC, Audubon Society of NH

14-Aug-01	**cwi**				LAC, Audubon Society of NH, Coastal Conservation Association, Coldwater Fisheries Coalition, Connecticut River Joint Commissions, Connecticut River Watershed Council, Exeter River LAC, Merrimack River Watershed Council, Merrimack Valley Paddlers, NH Rivers Council, New Hampton Conservation Commission, Pemigewasset River Council, Piscataquog Watershed Association, Society for the Protection of NH Forests, Souhegan Watershed Association

Comment: 1907.04 (c) should read: "Meet with dam owners and lakefront interests to explain…"

Response: Changed Env-Ws 1907.04(c).

(~~d~~**e**) Mediate and guide negotiations among dam owners, ~~and~~ affected water users, **and other applicable interests** towards water use and dam management that will meet protected instream flow requirements **and the recreational and ecological values of the reservoirs**; and

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907.04 (d)**	Joint Comments by AMC, Ashuelot LAC, Audubon Society of NH, Coastal Conservation Association, Coldwater Fisheries Coalition, Connecticut River Joint Commissions, Connecticut River Watershed Council, Exeter River LAC, Merrimack River Watershed Council, Merrimack Valley Paddlers, NH Rivers Council, New Hampton Conservation Commission, Pemigewasset River Council, Piscataquog Watershed Association, Society for the Protection of NH Forests, Souhegan Watershed Association
14-Aug-01	**cwi**				

Comment: 1907.04(d) should read: "Mediate and guide negotiations among dam owners and all applicable interests towards water use and dam management that will meet protected instream flow requirements and the recreational and ecological values of the reservoirs."

Response: Changed Env-Ws 1907.04(d)

(~~e~~**f**) For each dam prepare an individual dam management plan so that the net effect of implementation of all individual plans, in coordination with implementation of the water use plan, is maintenance of the protected instream flows.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907.04 (e)**	David L. Deen – Connecticut River Watershed Council
09-Jul-01	**cwi**				

Comment: This would seem to be an opportunity to begin to talk with the dam owner about removal of the dam. All impoundments cause thermal modification of the river and create a blockage to fish passage. Not all dams should remain and while this intensive infield work is being done those that should be removed could be identified.

Response: Noted.

(g) For each dam prepare an implementation schedule for the individual dam management plan.

(h) Prepare an economic assessment of the cost to implement the plan. The economic assessment shall:

(1) Include an estimate of implementation costs for each dam;

(2) Consider the implementation schedules in (f) above; and

(3) Include any other identified economic factors not attributable to dam operations.

Env-Ws 1907.05 Water Management Plan Document.

(a) The commissioner shall prepare a water management plan document defining the conservation measures and operational measures that will be implemented by each affected water user and dam operator in the WMPA to meet the protected instream flow requirements.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907.05 (a)**	Vernon Lang – US Fish and Wildlife Service
19-Jul-01	**cwi**				

Comment: This section should be modified to place the responsibility and requirement on dam, impoundment, lake and pond owners that meet the definition of affected water user as defined herein to develop conservation and operational plans to compensate for the stream flow lost to the outflow stream from: evaporation; enhanced evapotranspiration; ground water interception between the head of the impoundment and dam and ; inflow (streamflow) intercepted and held in storage as a consequence of impoundment/lake regulation. Affected water users that are water withdrawers should also be required to develop a water conservation plan as proposed in the draft rule. However, the operational plan for water withdrawers should be based on utilization of off stream sources of water during periods when streamflow is at or below protected instream flow levels.

Response: No Change. We have no information to indicate that dams in themselves are a generally significant factor in changing evapotranspiration, interception, or evaporation. If warranted, these factors could be included in either the protected instream flow study or the dam management plan for a particular river.

(b) The plan shall include an implementation schedule for each measure identified in (a).

(c) The commissioner shall make the **draft** water management plan available for public review at least 30 days before the hearing and opportunity for public comment under Env-Ws 1907.06.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907.05 (c)**	Jennifer J. Patterson – Conservation Law Foundation
13-Aug-01	**cwi**				

Comment: Add the word "draft" before "water management plan."

Response: Changed Env-Ws 1907.05(c).

Env-Ws 1907.06 Hearing and Opportunity for Public Comment on Water Management Plans.

(a) Prior to adoption of a water management plan for a designated river or segment, the commissioner, in cooperation with the IFPAC, shall hold a public hearing to receive comment as they pertain to the proposed plan on the following factors:

(1) Any factors identified in RSA 483, including considerations identified in RSA 483:1, RSA 483:6, IV(a), and RSA 483:9-c;

(2) Water quality standards;

(3) The extent to which implementation of the water management plan will maintain the established protected instream flows;

(4) Whether there are affected water users or dam owners in the ~~watershed~~**WMPA** that have failed to **provide information or** participate **in good faith** in negotiations for development of the plan;

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907.06 (a) (4)**	Jennifer J. Patterson – Conservation Law Foundation
13-Aug-01	**cwi**				
Comment: In the second line, after "to," rewrite to read "provide information or to participate in good faith in negotiations for development of the plan. (Underlined portions are new). **Response:** Changed Env-Ws 1907.06(a)(4)					

(5) Objections of affected water users or dam owners to provisions of the proposed plan;

(6) Information relevant to conservation, water use, or dam operation which has not been considered in preparation of the proposed plan;

(7) Information relevant to implementation of the proposed plan;

(8) Other information relevant to the proposed plan.

(b) The hearing shall be held in a community through or past which the designated river flows.

(c) At least 30 days before the hearing, the commissioner shall issue a notice of the hearing in a newspaper of local circulation and send written notice of the public hearing to and solicit comment from the following:

(1) Affected water users in the ~~watershed~~**WMPA**;

(2) Dam owners in the ~~watershed~~**WMPA**;

(3) Federal energy regulatory commission, for each designated river with a licensed or exempted hydropower site;

(4) LMAC members;

(5) LRMAC members for the designated river;

(6) The governing body of each municipality through or past which the designated river flows;

(7) National park service;

(8) New Hampshire department of justice;

(9) Public utilities commission;

(10) RMAC members;

(11) The governor of any state which shares a designated river;

(12) United States environmental protection agency;

(13) United States fish and wildlife service;

(14) United States forest service, for each designated river inside the white mountain national forest;

(15) United States geological survey; and

(16) Persons who have requested in writing to be notified of the hearing.

(d) At the public hearing, the commissioner shall specify a comment period which shall close at least 30 days after the hearing date, during which time the commissioner will receive written comments on the factors pertaining to the proposed Water Management Plan.

Env-Ws 1907.07 Adoption of Water Management Plans.

(a) Within 60 days of the close of the public comment period, the commissioner shall revise the plan in consideration of comments received and shall adopt the plan if:

(1) The plan contains the three major elements described in Env-Ws 1907.01;

(2) The conservation plan contains **reasonable** goals and timelines for each affected water user; and

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1907.07 (a) (2)**	Jennifer J. Patterson – Conservation Law Foundation
13-Aug-01	**cwi**				
Comment: Add the word "reasonable" before "goals and timelines." **Response:** Changed Env-Ws 1907.07(a)(2).					

(3) Implementation of the **conservation plan,** water use **plan** and dam management plan will result in maintenance of the established protected instream flows.

Date of Entry	Date of Response	Rule Reference	Source of Comment

Date	initials	date	initials	**1907.07 (a) (3)**	Vernon Lang – US Fish and Wildlife Service
19-Jul-01	**cwi**				

Comment: This subsection should be revised to be consistent with the notion that each individual affected water user, as defined herein, is responsible for operating their project to protect instream public uses and comply with protected instream flows as recommended elsewhere in these comments.

Response: No Change. The requirement is that the combined actions of all affected users in a WMPA, taken together, result in the maintenance of established protected instream flows. The responsibility of each individual water user is to comply with their portion of the Water Management Plan.

(b) The commissioner's adoption shall:

(1) Be in writing;

(2) Include a summary of comments received; and

(3) Include an explanation of how the comments affected the final plan.

(c) The commissioner shall send copies of the plan to:

(1) All persons identified in Env-Ws 1907.06 (c); and

(2) Persons who submitted written comments on the **draft plan**~~proposed flows~~ and who requested to receive a copy of the **plan** ~~notice of the established flows~~.

Env-Ws 1907.08 ~~Reconsideration of an Element of a~~ **Changes to an Adopted** Water Management Plan.

(a) A person may file a petition with the commissioner to request change or reconsideration ~~of an element~~ of an adopted plan**, when:**

(1) There is a new water user in the WMPA;

(2) An existing water user desires to increase water use;

(3) An existing user has changes in timing of water use;

(4) An existing water user has decreased water use; or

(5) There are changes in circumstances or operating conditions for a water user or dam owner that warrant change to the Plan.

(b) If the petition is filed within 30 days of the date of adoption, the implementation of the decision will be stayed until the commissioner has acted on the petition, in accordance with RSA 483:9-c, VI.

(c) The petition shall be in writing.

(d) The petition shall include:

(1) The name, address and daytime telephone number of the person requesting reconsideration;

(2) If the person requesting reconsideration is not an individual, the name of an individual who can be contacted on behalf of the organization requesting the reconsideration;

(3) The specific change being sought in the plan;

(4) An explanation of how the requested change to the adopted plan is consistent with maintenance of established protected instream flows and water quality standards;

(5) Documentation that all affected water users and dam owners to whom the change applies have agreed to the change, or if all have not agreed, an explanation of the reasons for failure to agree;

(6) If applicable, the specific error(s) committed by the commissioner in adoption of the plan;

(7) Data not available or considered at the time the plan was adopted.

(e) Absent a showing of good cause, the commissioner shall not grant a request for reconsideration, which is based on information that was available to the party requesting reconsideration when the Water Management Plan was prepared, but was not submitted to the department in a timely fashion.

(~~e~~**f**) Within 30 days of receiving a petition for reconsideration, the commissioner shall:

(1) Deny the request and affirm the adopted plan; or

(2) Grant the request and reconsider the provisions of the plan requested.

(~~f~~**g**) If the commissioner believes that an oral hearing would facilitate making a decision to deny or grant the request, the commissioner shall:

(1) Schedule a hearing;

(2) Notify the person **who made the request, any other person who has requested to be notified, and the general public** of the date, time and place of the hearing.

(~~g~~**h**) Any hearing so scheduled shall be conducted in accordance with ~~RSA 541-A and~~ Env-C 20~~0~~**5 relative to non-adjudicative public hearings**.

(i) The commissioner shall grant the request if the information in the request or other information reviewed by the commissioner indicates that criteria in (a) above for changes to a Water Management Plan are met.

(~~h~~**j**) ~~If the commissioner denies the request,~~ **The commissioner's decision shall**:

(1) ~~Notify the person~~ **Be in writing** ~~of the denial~~; ~~and~~

(2) Be sent to the person who requested the instream flow to be established and to any other person who has asked to be notified of the decision in writing;

(3) Be made available electronically to the general public; and

(~~2~~**4**) State the reason(s) for the ~~denial~~ **decision, whether the decision is to deny the request or to establish protected instream flows**.

(~~i~~**k**) If the commissioner grants the request, the commissioner shall~~:~~

~~(1) Notify the person in writing that protected instream flows will be established; and~~ **Within 30 days of the decision,** initiate hearing and opportunity for public comment on the requested revisions to the plan by the process described in Env-Ws 1907.06 and 1907.07.

(~~j~~**l**) The commissioner may change or reconsider an element of an adopted plan by the process described in Env-Ws 1907.06 and 1907.07.

Part Env-Ws 1908 PRIORITY LIST

Env-Ws 1908.01 Priority List Required. ~~When more than one Water Management Plan is required under Env-Ws 1905.01, but not completed,~~

(a) ~~t~~**T**he commissioner, in consultation with the RMAC, shall prepare a priority list and a schedule for preparation of ~~the~~ **Water Management** plans~~.~~ **when:**

(1) A Water Management Plan is required under Env-Ws 1905.01, but not completed; or

(2) A request under Env-Ws 1905.02 to establish protected instream flows has been granted and the Water Management Plan is not completed.

(b) The commissioner shall consider the following factors in preparing the priority list:

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1908.01**	Sharon Francis – Connecticut River Joint Commissions, Inc.
27-Jul-01	**cwi**				

Comment: The Connecticut River will not be one of the first rivers eligible for the instream flow protections identified in this proposed rule. The Connecticut River Joint Commissions request that all designated rivers be included on the priority list, and their priority indicated, not just those whose need for instream flow protection has been identified. In that way, we and other interested parties can always see where we stand in relation to all the other rivers in the program.

Response: Changed Env-Ws 1908.01

(~~a~~**1**) The degree to which the general standard is exceeded;

(~~b~~**2**) The likelihood of adverse effects on protected instream uses in that watershed;

(~~c~~**3**) The location in the drainage basin relative to other watersheds for which a water management plan has been initiated.

Env-Ws 1908.02 Priority List Publication. The commissioner shall publish the priority list annually.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1908.02**	Matthew A. Chauncey – NH Resident
16-Jul-01	**cwi**				

Comment: Does the commissioner have initial priority list and schedule for any designated or proposed designated rive. Where are they? Where is the list?

Other than interested party desire with many agendas desiring to access and control private property under the guise of controlling the public entity water without consultation, consent or request of those who own the riparian rights.

Response: 1) Yes. The initial priority list has been prepared and is posted on the instream flow rule website at http://www.des.state.nh.us/rivers/instream/draft_rules.htm.

2) No Change - further discussion encouraged. Several commenters expressed the opinion that the draft rules may administratively diminish common law riparian rights. We do not believe this to be the case, and will work with stakeholders to obtain legal opinions to resolve this issue.

Env-Ws 1908.03 Initial Priority List and Determinations for Newly-Designated Rivers.

(a) For rivers designated prior to the effective date of these rules, the commissioner, in consultation with the RMAC, shall within three months of the effective date of the rules:

(1) Determine if a Water Management Plan is required;

(2) Prepare an initial priority list and schedule.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1908.03**	Ross Povenmire and Allan Palmer – PSNH
20-Jul-01	**cwi**				

Comment: Three months is too short of a time frame for DES to determine if WMPs are required for existing and newly designated rivers and to assign priorities. DES should allow itself at least 6 months to manage this considerable task to ensure that all factors are properly and fully considered.

Response: No Change. The initial priority list has already been prepared. It is available on the instream flow website at http://www.des.state.nh.us/rivers/instream/draft_rules.htm.

(b) For rivers designated after the effective date of these rules, the commissioner shall determine if a water management plan is required for any river or segment within three months of designation **and if so shall prepare a revised priority list that includes the newly-designated river**.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1908.03 (b)**	Jennifer J. Patterson – Conservation Law Foundation
13-Aug-01	**cwi**				

Comment: In the second line, after the word "segment," add ", and if so the priority of that plan,"

Response: Changed Env-Ws 1908.03(b)

Part Env-Ws 1909 INSTREAM FLOW PROTECTION ADVISORY COMMITTEE.

Env-Ws 1909.01 Establishment. Prior to establishing protected instream flows for any designated river, the commissioner, in consultation with the RMAC, shall appoint **and convene** an instream flow protection advisory committee (IFPAC) for the designated river and its WMPA.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1909.01**	Jennifer J. Patterson – Conservation Law Foundation
13-Aug-01	**cwi**				

Comment: In the second line, after the word "appoint," add "and convene"

Response: Changed Env-Ws 1909.01.

Env-Ws 1909.02 Composition.

(a) All committee members shall be New Hampshire residents ~~and include:~~**.**

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1909.02**	Judith Spang – Lamprey River Advisory Committee
27-Jul-01	**cwi**				

Comment: In specific terms, the LRAC applauds the following: 1) The Instream Flow Protection Advisory Committee, responsible for providing information and feedback to the Commissioner of DES on the evolving Water Management Plans, includes a significant number of local representatives. This protects local values and also assures the relevance of information used. The Committees are also well-balanced between water users and resource advocates.

Response: Noted.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1909.02**	Michael S. Giaimo - Business and Industry Association
19-Jul-01	**cwi**				

Comment: § 3 THERE IS AN UNEQUAL REPRESENTATION ON THE INSTREAM FLOW PROTECTION ADVISORY COMMITTEE

The committee members of the instream flow protection advisory committee (Part Env-Ws 1909) are not a fair representation of water users. This committee's make-up should be a more fair representation of water users. The BIA believes that the committee should have more affected and impacted users on it. The representation should be proportional based on use and consumption, thus there should be more individuals on the committee representing business, water suppliers, municipalities, agriculture, golf courses, etc. The individuals subject to the rules should have a clear and unmistakable voice in the process and planning stages.

Response: No Change - further discussion encouraged. We received comments on both sides. Lets see if we can work out something in informal discussions.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1909.02**	Ralph B. Pears – Monadnock Mountain Spring Water
13-Aug-01	**cwi**				

Comment: The representation of affected water users and the business community on any of the contemplated instream flow protection advisory panels is woefully inadequate. As currently structured, these proposed advisory groups would be heavily dominated by parties, with strong interests in water resource protection and conservation, but minimal evident concerns for, or insight into, the potential impacts of water use restrictions on the economic basis of local affected business and industry. There should be a more equitable representation of business and industry on such advisory groups.

Response: No Change - further discussion encouraged. We received comments on both sides. Lets see if we can work out something in informal discussions.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1909.02**	Matthew A. Chauncey – NH Resident
16-Jul-01	**cwi**				

Comment:

1. Riparian owners need to be acknowledged of proceedings and represented on IFPAC.
2. Army Corps of Engineers needs to be on IFPAC
3. FERC needs to be on IFPAC

Response: No Change - further discussion encouraged. We received comments on both sides. Lets see if we can work out something in informal discussions.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1909.02**	Joint Comments by AMC, Ashuelot LAC, Audubon Society of NH, Coastal Conservation Association, Coldwater Fisheries Coalition, Connecticut River Joint Commissions, Connecticut River Watershed Council, Exeter River LAC, Merrimack River Watershed Council, Merrimack Valley Paddlers, NH Rivers Council, New Hampton Conservation Commission, Pemigewasset River Council, Piscataquog Watershed Association, Society for the Protection of NH Forests, Souhegan Watershed Association
14-Aug-01	**cwi**				

Comment: In addition, we believe that lakefront interests should be included in the negotiations leading to the development of dam management plans. [. . .]

The composition of the Instream Flow Protection Advisory Committee is skewed toward the regulated community, and there is no provision for including experts on instream flow needs. The lay person makeup of the committee could result in a political rather than hydrologically or biologically sound recommendation. We believe this section should include representatives of both the NH Fish and Game Department and the US Fish and Wildlife Service and, to the extent possible, scientists with knowledge and experience in evaluating instream flow needs.

We suggest the following composition:

(a) two LRMAC members
(b) up to three representatives of affected water users, one being agricultural and one being a public water supplier, if applicable
(c) one representative of the US FWS
(d) one representative of the NH F&G Dept.
(e) one dam owner if applicable
(f) one representative of lake interests if applicable
(g) one representative of the conservation community
(h) one representative of river recreation interest
(i) one local government official

As stated above, the composition of the committees should also include a hydrologist and/or biologist with relevant experience in evaluating instream flow needs.

Response: No Change - further discussion encouraged. We received comments on both sides. Lets see if we can work out something in informal discussions.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1909.02**	Mark Archambault – Nashua Regional Planning Commission
14-Aug-01	**cwi**				

Comment: NRPC endorses the fact that the new draft rules downplay the Local Advisory Committee's (LAC) role in developing Water Management Plans (WMP) due to their time constraints and lack of expertise. The LACs perform a valuable role, but they are composed primarily of concerned citizens, not professionals in river management issues. NRPC believes that full-time professionals should prepare WMPs.

Response: Noted.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1909.02,** 1905.02 (e), 1906.03 (b), 1907.06	Tom Chasse – Attitash Bear Peak
25-Jul-01	**cwi**				

Comment: The public and special interest groups play too large a role in the decision-making process - it will be virtually impossible to arrive at a consensus, just as it has been with the whole minimum flow issue;

Response: No Change - further discussion encouraged. We received comments on both sides. Lets see if we can work out something in informal discussions.The goal is not to reach consensus, but to document and adopt a Water Management Plan that maintains flows to protect instream public uses.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1909.02**	Ross Povenmire and Allan Palmer – PSNH
20-Jul-01	**cwi**				

Comment: Membership of the IFPAC does not include a fair representation of affected water users. The Committee includes only 2 AWUs in the WMPA, an inappropriately meager representation. Membership should be expanded to provide a greater voice to the affected parties, or a separate and equal committee made up of only AWUs should be established.

Response: No Change - further discussion encouraged. We received comments on both sides. Lets see if we can work out something in informal discussions.

(b) Committee membership shall include:

~~(a)~~**(1)** Two LRMAC representatives;

~~(b)~~**(2)** Two representatives of affected water users in the WMPA;

~~(c)~~**(3)** One ~~local~~ conservation commission member **from a town or city in the WMPA**;

~~(d)~~**(4)** One ~~local~~ government official representative **from a town or city in the WMPA**;

~~(e)~~**(5)** One representative of recreational interests;

~~(f)~~**(6)** One ~~local~~ community citizen representative **from a town or city in the WMPA**;

~~(g)~~**(7)** One representative of the conservation community;

~~(h)~~**(8)** One representative of ~~the local~~ business ~~community~~**in a town or city in the WMPA**;

~~(i)~~**(9)** One representative of a lake association in the WMPA;

~~(j)~~**(10)** One public water supplier ~~with~~in the WMPA, if any;

~~(k)~~**(11)** One dam owner ~~with~~in the WMPA; and

~~(1)~~**(12)** One agricultural water user ~~with~~in the WMPA, if any.

Env-Ws 1909.03 Duties. The duties of the committee shall be:

(a) To provide information to the commissioner towards completion of a protected instream flow study as detailed in Env-Ws- 1906.02~~.~~**;**

(b) To review and comment on the protected instream flow study ~~identified in (a) .~~**;**

(c) To provide information to the commissioner towards the completion of a water management plan as detailed in Env-Ws- 1907.01~~.~~**;**

(d) To review and comment on the water management plan ~~identified in (c).~~**; and**

(e) To assist the commissioner in hearings, negotiations, and public meetings related to establishment of protected instream flows and adoption of water management plans.

1909.04 IFPAC Period of Service. The committee shall serve until the commissioner adopts the water management plan.

1909.05. Meetings.

(a) The commissioner shall schedule and convene the first meeting**.**

(b) ~~at which~~**At the first meeting** the committee shall elect a chair~~man~~ and vice chair~~man~~.

(c) Subsequent meetings shall be at the call of the chair, or at the request of three or more committee members.

(d) The commissioner shall provide administrative support for the committee.

Part Env-Ws 1910 ESTIMATION OF AGGREGATE WATER USE

Env-Ws 1910.01 Estimation of aggregate water use.

(a) Each year ~~T~~**t**he department shall estimate aggregate water use and stream flow ~~on~~**for** each designated **river using the most appropriate preceding years' data to best reflect representative conditions.** ~~for the preceding calendar year, and~~

(b) Each year ~~T~~the Department shall publish a report no later than the first day of June including:

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1910.01**	Vernon Lang – US Fish and Wildlife Service

19-Jul-01	**cwi**				Wildlife Service

Comment: The procedures for estimating aggregate water use should be modified to include affected water users as proposed herein under 1902.02. Specifically, this should include evaporation, enhanced evapotranspiration, ground water interception within the impoundment and inflow intercepted as a consequence of impoundment/lake level regulation.

Response: No Change. We have no information to indicate that dams in themselves are a generally significant factor in changing evapotranspiration, interception, or evaporation. If warranted, these factors could be included in either the protected instream flow study or the dam management plan for a particular river.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1910.01**	Matthew A. Chauncey – NH Resident
16-Jul-01	**cwi**				

Comment: The commissioner has had data submitted by a number of registered water users for a number of years – what does this data reveal?

Are we headed for a crisis?

Is there a need for this to be established for any specific need?

Response: Analysis of reported water use by registered water users is available on the instream flow website at http://www.des.state.nh.us/rivers/instream/studies.htm

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1901.10**	Joint Comments by AMC, Ashuelot LAC, Audubon Society of NH, Coastal Conservation Association, Coldwater Fisheries Coalition, Connecticut River Joint Commissions, Connecticut River Watershed Council, Exeter River LAC, Merrimack River Watershed Council, Merrimack Valley Paddlers, NH Rivers Council, New Hampton Conservation Commission, Pemigewasset River Council, Piscataquog Watershed Association, Society for the Protection of NH Forests, Souhegan Watershed Association
14-Aug-01	**cwi**				

Comment: Using just the previous year's data is fraught with potential problems and misrepresentations since any particular year could be an extreme event year hydrologically and water use wise. Revise this section to read: "The department shall estimate aggregate water use and stream flow on each designated river using the most appropriate preceding years data to best reflect representative conditions, and shall publish a report no later than the first day of June including:"

Response: Changed Env-Ws 1901.10

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1910.01**	Mark Archambault – Nashua Regional Planning Commission
14-Aug-01	**cwi**				

Comment: The revised rules do not address how or where stream flow will be measured. The rules mention upgrading USGS stream gauges but do not mention how or where they should be used.

Response: Noted. The existing stream gage network would be used, and is adequate to implement the rules. We are planning to work with USGS to enhance stream gaging in order to better implement the rules.

(~~a~~**1**) Estimated water use for each affected water user;

(~~b~~**2**) Estimated aggregate water use at each withdrawal or return location;

(~~c~~**3**) Estimated stream flow at each withdrawal or return location;

(~~c~~**4**) Identification of any times when and locations where designated rivers that do not have established protected instream flows under Env-Ws Part 1906 are not in compliance with the general standard;

(~~d~~**5**) Identify a WMPA for designated rivers that are not in compliance with the general standard;

(~~e~~**6**) For designated rivers with protected instream flows established under Env-Ws Part 1906, identification of any times and locations at which protected instream flows were not maintained~~.~~**; and**

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1910.01 (e)**	Joint Comments by AMC, Ashuelot LAC, Audubon Society of NH

14-Aug-01	**cwi**				LAC, Audubon Society of NH, Coastal Conservation Association, Coldwater Fisheries Coalition, Connecticut River Joint Commissions, Connecticut River Watershed Council, Exeter River LAC, Merrimack River Watershed Council, Merrimack Valley Paddlers, NH Rivers Council, New Hampton Conservation Commission, Pemigewasset River Council, Piscataquog Watershed Association, Society for the Protection of NH Forests, Souhegan Watershed Association

Comment: As currently drafted, these sections establish a General Standard for instream flow protection, which can be replaced with a site-specific protected instream flow as soon as that flow is established. Since the General Standard and protected instream flow are used as limits for new or expanded uses of river water, the result of this approach is that the protected flows become the limit on new and expanded uses. Since there are no enforceable provisions in effect until management plans take effect, the rules unwisely allow use to expand to the limit of the protected flows. Once uses are permitted, there appears to be no recourse for enforcement of the limits until the water management plans are in place, and use could readily encroach on the protected flows. In addition, requirements for conservation are contained in the water management plans, yet water use could expand to the limit of the protected flows before these conservation provisions take effect.

We believe the rules should take a stronger stand on conservation and should stave off increased use until the management plans are in place. To that end, we recommend that the phrase "that do not have an established protected instream flow" be deleted from section 1904.01. In addition, sections 1905.04(c) and 1910(e) should be deleted. The effect of these changes would be to maintain the General Standard as the applicable limit on increased water use until water management plans are in place (at which time the protected instream flow would become the new limit on water use).

Response: No change. We intend to use the established protected instream flows in administering Env-Ws 1905 and the water quality standards, as soon as the protected flows are established. This would place the burden of maintaining protected flows on permit applicants until the Water Management Plan is completed.

(f7) For designated rivers with water management plans adopted under Env-Ws Part 1907, identification of any times and locations for which the provisions of the water management plan were not met.

PART Env-Ws 1911 ADMINISTRATION OF WATER MANAGEMENT PLANS

Env-Ws 1911.01 Compliance with Adopted Water Management Plan. Affected water users and dam owners shall comply with the provisions of an adopted water management plan.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1911.01**	Joint Comments by AMC, Ashuelot LAC, Audubon Society of NH, Coastal Conservation Association, Coldwater Fisheries Coalition, Connecticut River Joint Commissions, Connecticut River Watershed Council, Exeter River LAC, Merrimack River Watershed Council, Merrimack Valley Paddlers, NH Rivers Council, New Hampton Conservation Commission, Pemigewasset River Council, Piscataquog Watershed Association, Society for the Protection of NH Forests, Souhegan Watershed Association
14-Aug-01	**cwi**				

Comment: The rules say little about how and when enforcement will be handled. In addition, while the rules require compliance with the provisions of the water management plans, those provisions are not clearly identified as enforceable provisions. At a minimum, this section should read:

1911.01 Compliance with and Enforcement of Adopted Water Management Plan and General Instream Flow Standard: Affected water users and dam owners shall comply with the provisions of an adopted water management plan. The Department shall enforce the provisions of the Water Management Plans and the General Standard for Instream Flow Protection.

Response: No Change. It is not necessary to state that the Department shall enforce compliance. Our intent is to assess compliance by after-the-fact audits. This activity would depend on staff availability, as would any follow-up enforcement. These activities would be guided by the Department Compliance Assurance Response Policy, available on the web at http://www.des.state.nh.us/legal/

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1911**	Jason R. Mulcahy – Golf Course Superintendents Association
14-Aug-01	**cwi**				

Comment: Provisions for enforcement are not adequately addressed in the revised rules.

Response: No Change. Our intent is to assess compliance by after-the-fact audits. This activity would depend on staff availability, as would any follow-up enforcement. These activities would be guided by the Department Compliance Assurance Response Policy, available on the web at http://www.des.state.nh.us/legal/

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1911**	Geoff Smith and Kari Dolan - National Wildlife Federation
14-Aug-01	**cwi**				

Comment: Enforceability of the Water Management Plans
Once a PIF is established for a designated river, the pre-draft rules require that a Water Management Plan (WMP) be adopted pursuant to the procedures set forth in section 1907. WMPs are the cornerstone of New Hampshire's proposed instream flow protection strategy. These three-tiered plans include a conservation plan, a water use plan, and a dam management plan, as well as an implementation strategy and timelines for completing the required conservation measures. The WMP document required under the section 1907.05 integrates the information from the three plans into one document that that defines how the Protected Instream Flow will be met.

While we generally support the WMP process, we question how DES will assure that affected water users implement the conservation measures spelled out in the plan. The pre-draft rules do not specify who will monitor compliance with WMP and what enforcement mechanisms DES will use if water users violate the provisions of the WMP. We acknowledge that Section 1911 attempts to address this issue by stating that affected water users and dam operators shall comply with the provisions of the WMP. We are concerned that the language in section 1911 may not be adequate to ensure implementation of the WMPs. The stated purpose of the rules is to adopt *and enforce* protected instream flows on designated rivers. We recommend that DES include specific language addressing enforcement mechanisms in the final rule.

Response: No Change. Our intent is to assess compliance by after-the-fact audits. This activity would depend on staff availability, as would any follow-up enforcement. These activities would be guided by the Department Compliance Assurance Response Policy, available on the web at http://www.des.state.nh.us/legal/

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**Part 1911**	Carl Deloi – EPA
20-Jul-01	**cwi**				

Comment: The draft rule (Part 1911) states that all affected water users and dam owners shall comply with the provisions of an adopted water management plan. It is not clear from this section, however, how implementation of the plan will be monitored and how enforcement, where necessary, will occur. The mechanism for accomplishing this should be clarified.

Response: Our intent is to assess compliance by after-the-fact audits. This activity would depend on staff availability, as would any follow-up enforcement. These activities would be guided by the Department Compliance Assurance Response Policy, available on the web at http://www.des.state.nh.us/legal/

PART Env-Ws 1912 WAIVERS

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**Part 1912**	Joint Comments by AMC, Ashuelot LAC, Audubon Society of NH

14-Aug-01	**cwi**				LAC, Audubon Society of NH, Coastal Conservation Association, Coldwater Fisheries Coalition, Connecticut River Joint Commissions, Connecticut River Watershed Council, Exeter River LAC, Merrimack River Watershed Council, Merrimack Valley Paddlers, NH Rivers Council, New Hampton Conservation Commission, Pemigewasset River Council, Piscataquog Watershed Association, Society for the Protection of NH Forests, Souhegan Watershed Association

Comment: This section is redundant and should be deleted. Even without this provision, the rules contain adequate recourse for the regulated community to seek relief. The flow establishment procedure provides a significant level of participation by the regulated community, and it also contains an appeals process should the protected flow levels be problematic for any individual or business. In addition, the enforceable aspects of the rules are developed through a negotiated process, and even that process can be appealed through the reconsideration provisions of 1907.08. This approach is far more inclusive than most rulemakings, and provides more than adequate consideration of "special needs." Leaving this waiver in the rules is an invitation to a rush for exemptions, and is likely to stall the process.

Response: No change. In our broad experience as a department we have generally found that a generic waiver provision allows consideration of special circumstances where application of the strict wording of the rule is impossible or impractical but there are other ways to accomplish the intent.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**Part 1912**	Ross Povenmire and Allan Palmer – PSNH
20-Jul-01	**cwi**				

Comment: <u>The rules should include provisions for emergency water use waivers where there is an imminent and substantial threat of environmental harm or public safety</u>. DES should be granted emergency authority to respond to situations that may arise where temporary suspension of water use restrictions is necessary to protect the environment and public safety.

Response: No Change. The statute contains this provision in RSA 483:9-c.IV.

Env-Ws 1912.01 <u>Waivers</u>

(a) The rules contained in this part are intended to apply to a variety of conditions and circumstances. It is recognized that strict compliance with all rules prescribed herein might not fit every conceivable situation. Affected persons may request a waiver of specific rules outlined in this part in accordance with paragraph (b) below.

(b) All requests for waivers shall:

(1) Be submitted in writing to the commissioner; and

(2) Include the following information:

a. A description of the designated river and water use, instream public use or resource to which the waiver request relates;

b. A specific reference to the section of the rule for which a waiver is being sought;

c. A full explanation of why a waiver is necessary and demonstration of the ~~affect~~ **effect** caused if the rule is adhered to;

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1912.01 (b) (2) c**	Jennifer J. Patterson – Conservation Law Foundation
13-Aug-01	**cwi**				
Comment: Change "affect" to "effect."					
Response: Changed Env-Ws 1912.01(b)(2)c.					

d. A full explanation of the alternatives for which a waiver is sought with supporting data; and

e. A full explanation of how the alternatives for which a waiver is sought are consistent with the intent of RSA 483:9-c, would have a just result, and would adequately protect human health and the environment.

(c) The commissioner shall grant a waiver if the commissioner finds that the alternatives proposed are at least equivalent to the requirements contained in this **chapter** ~~part~~, meet water quality standards, and are adequate to ensure that the provisions of RSA 483:9-c are met.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1912.01 (c)**	Jennifer J. Patterson – Conservation Law Foundation
13-Aug-01	**cwi**				
Comment: In the second line, change "part" to "chapter."					
Response: Changed Env-Ws 1912.01 (c)					

(d) The commissioner shall not grant any waiver that contravenes the intent of any rule.

(e) The commissioner shall issue a written response to a request for a waiver.

(f) If the waiver is denied, the commissioner shall specifically set forth the reason(s) for the denial.

(g) The commissioner shall grant a waiver for a specific time period not to exceed 10 years.

PART Env-Ws 1913 COMPLIANCE BY POLITICAL SUBDIVISIONS

Env-Ws 1913.01 Procedures

(a) ~~If the governing body or an authorized official of a political subdivision believes that~~**In response to an action by the department to compel compliance with the4se rules, if a political subdivision has chosen not to comply with** ~~compliance with any provisions of~~ these rules ~~by the political subdivision would violate~~ **on the basis of** the provisions of Part I, Article 28-a of the New Hampshire Constitution or RSA 541-A:25, ~~the governing body or~~ **an** authorized official **shall so** ~~may~~ notify the commissioner in writing. The notification shall state:

(1) The specific rule, by section number, to which the political subdivision believes the provisions of Article 28-a or RSA 541-A:25 ~~applies~~**apply**;

(2) The estimated amount of funding required by the political subdivision to comply with the rule;

(3) That the **local** legislative body of the political subdivision has considered and failed to appropriate funding to comply with the rule identified pursuant to (1) above; and

(4) The date the action in (3) above was taken.

(b) Within 30 days of receipt of a notification under (a) above, the commissioner shall review the notification and respond in writing. The response shall state the results of the review, specifically:

(1) Whether the specific provisions of the rule identified by the political subdivision pursuant to (a) above implement a federal statute or regulation with which the political subdivision would otherwise be required to comply by the federal government;

(2) Whether the commissioner believes that the specific provisions of the rule identified by the political subdivision pursuant to (a) above contains new, expanded, or modified programs or responsibilities compared to those in effect on November 28, 1984; and

(3) Whether the commissioner believes that the state has provided or will provide funding to the political subdivision in order that the political subdivision can comply with the rule.

Env-Ws 1913.02 Commissioner Action. If the commissioner ~~agrees with the political subdivision that the rule objected to by the political subdivision is~~ **determines that the political subdivision is excused from complying with the rule identified in (a) above based on** ~~subject to~~ Part I, Article 28-a or RSA 541-A:25 ~~and that the state has not provided nor will provide funding to the political subdivision in order that the political subdivision can comply with the rule,~~ the commissioner shall issue a notice in writing to the political subdivision that the commissioner will not take action against the political subdivision to compel compliance with the rule or to impose penalties for failing to comply.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1913.02**	David L. Deen – Connecticut River Watershed Council
09-Jul-01	**cwi**				

Comment: CRWC feels that the claims of any local unit of government should be tested through a public hearing process much like those set in place for water management plans. The legislative body of a unit of local government may not vote required resources for implementation but a selectboard or alder board vote does not necessarily reflect the thinking of all citizens within that jurisdiction. Before the commissioner absolves a town or other public entity of responsibility under these rules the public should have a chance to make their views known. As an alternative to a public hearing if towns shows that at a duly noticed town meeting the citizens voted not to make the resources available then a public hearing would not be required before the commissioner's decision.

Response: No Change. We agree that the decision not to comply with the rules should be made by more than a small group of people. The requirement that funding be affirmatively rejected by the local legislative body (e.g. town meeting) is intended to address this.

Date of Entry		Date of Response		Rule Reference	Source of Comment
Date	initials	date	initials	**1913**	Maura Carroll – New Hampshire Municipal Association
27-Jul-01	**cwi**				

Comment: [. . .] we offer the following comments regarding Env-Ws 1913, Compliance by Political Subdivisions. Although the department has attempted to insert a procedure in the rules to address Part I, Article 28-a of the New Hampshire Constitution, the procedure requires municipalities, in effect, to petition the department not to enforce the provisions of the rules which violate the constitution, after a legislative body vote is taken and the municipality refuses to appropriate money to comply with the rules.

While we and the department may agree that both the constitution and the statute protect municipalities from unfunded state mandates, we start with a fundamentally different premise. As we read both N.H. Munic. Trust Workers' Comp. Fund v. Flynn, Comm'r, 133 N.H. 17 (1990), and the specific language contained in RSA 541-A:25, we interpret both to mean that the only legislative body action needed is when a municipality chooses to fund and accept an unfunded state mandate. If a municipality chooses not to accept the mandate, it need do nothing. *No affirmative action is required to reject an unfunded state mandate*. Thus, we would advise our members that they may choose to follow the procedures set forth in Env-Ws 1913, but need not do that if they believe the rules contain an unfunded state mandate.

Response: Changed Env-Ws 1913. We have limited the section's applicability to situations where the department has initiated some action to compel compliance. We need some way to ascertain whether or not a political subdivision is applying Article 28-a or RSA 541-A:25 so that we can agree or disagree, and then take appropriate administrative actions.